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No. 90-368

Supreme Court, U.S.
FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

SHELDON BARUCH TOIBB,
vs *Petitioner,*
STUART J. RADLOFF, TRUSTEE,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

JOINT APPENDIX

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the Judgment Below

PETITION FOR WRIT OF CERTIORARI FILED AUGUST 2, 1990
CERTIORARI GRANTED JANUARY 18, 1991

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RELEVANT DOCKET ENTRIES

(Complete)

Date of Filing	Proceedings
United States Bankruptcy Court	
11/18/86	Statement of Affairs and Schedules or Chapter 13 Statement.
11/18/86	Appointment of Trustee Trustee's Bond and Order/Trustee's Acceptance
11/25/86	Notice of § 341 Meeting and Certification of Mailing § 341 Date: 12/16/86 § 341 Time: 11:30 A.M. § 341 Location: 10 Chapter 7 (45)
11/18/86	Last date for discharge/dischargeability complaints: 02/16/87 (correction entered: 1/19/88 under Chapter 11). Claims Bar Date 2/16/88 under Chapter 11
12/16/86	§ 341 Meeting Conducted. Discharge entered. Notice of Discharge/Certification of Mailing
12/10/86	Trustee Final Report <input type="checkbox"/> No asset <input type="checkbox"/> Assets (Correction entered: set aside.)
12/22/86	Good faith review had.
03/25/87	Trustee's application to set aside order of no distribution filed.
03/26/87	Trustee's application to set aside no distribution SO ORDERED by Judge.
03/27/87	Discharge entered.
03/27/87	Notice of Discharge/Certificate of Mailing (44)

Date of Filing	Proceedings
06/02/87	Trustee's petition to employ counsel filed and granted. Affidavit of Carl C. Lang filed.
08/06/87	Trustee's notice to creditors that he received offer from Board of Directors of IEC to purchase debtor's stock for \$25,000.00 and trustee will consummate sale unless objections are filed within 20 days.
08/06/87	Notice of above mailed. (44)
08/26/87	Objection to sale of Debtor's stockholdings in Independence Electric Corporation filed by Dickstein, Shapiro & Morin, Arthur J. Galligan, Attorney.
08/26/87	Withdrawal of attorney for debtor filed by Gerald Kimmel.
08/27/87	ORDERED that employment of Peper, Martin, Jensen, Maichel & Hetlage as counsel for debtor is approved and shall be substituted as counsel for debtor.
08/31/87	Objection to sale of debtor's stockholdings in Independence Electric Corp. set for hearing 9-30-87 at 9:30 am, any opposing responses must be filed by 9-21-87, FURTHER ORDERED that counsel for debtor has until 9-21-87 to file a pleading indicating position of debtor with respect to said sale filed.
08/25/87*	Application to substitute counsel filed by debtor.
08/26/87*	Motion to extend the time period for filing objections to proposed sale of assets filed by debtor.
08/31/87	ORDERED that counsel for debtor shall have until 9-21-87 to file a pleading indicating position of debtor with respect to said sale.

Date of Filing	Proceedings
09/21/87	Objections of debtor to proposed sale of debtor's common stock in Independence Electric Corp. filed. Petition to Convert to Chapter 11 filed by debtor.
10/02/87	ORDERED that debtor's petition to convert to Chapter 11 is GRANTED, and that this order constitute an order for relief under Chapter 11, debtor to file by 10-16-87 his Chapter 11 Statement of Affairs and schedules and 20 largest Unsecured Creditors, that Stuart Radloff is discharged of his trust as Chapter 7 Trustee. Complete inventory to be filed by 10-16-87, reports and summaries be filed monthly, first report be filed by 11-15-87, each monthly report to be filed by the 15th of each succeeding month, debtor to file his disclosure statement and Plan of Reorganization by 2-2-88.
10/20/87	Debtor's Statement of Affairs, A schedules, B schedules, schedule of current income and current expenditures, Statement of Executory contracts, List of 20 Largest Unsecured claims and amended matrix filed.
11/6/87	Application for attorney's fees filed by Carl C. Lang. Trustee's application for fees filed.
10/29/87*	Order for meeting of creditors § 341 set for hearing on 11-18-87 at 2:00 pm under Chapter 11, that 2-16-88 is last day for filing proof of claim, that 1-19-88 is last day for filing a complaint to determine the dischargeability of a debt filed. Certificate of mailing on above notice. (57)

Date of Filing	Proceedings
02/01/88	Debtor's amendment to Schedule A-3 and summary filed. Debtor's disclosure statement and plan of reorganization filed.
02/03/88	ORDERED that hearing on adequacy of debtor's disclosure statement be held on 3-7-88 at 9:30 a.m. and counsel for debtor to transmit before 2-8-88 to each creditor notice of hearing and file certificate of mailing before 2-10-88. Notice of hearing on disclosure statement to be mailed filed.
02/10/88	Notice of hearing on trustee's application for payment of compensation and application of attorney for trustee for payment of compensation set 3-7-88 at 9:30 a.m. mailed to creditors. Objections must be filed by 3-4-88. Certificate of mailing of copies of notice of hearing on disclosure statement and notice of hearing on trustee application and attorney for trustee application for compensation to creditors filed.
03/08/88	ORDERED that debtor show cause on 3-30-88 why this case should not be dismissed for debtor's failure to qualify as a Chapter 11 debtor.
03/08/88	Notice of above mailed. (68)
03/22/88	Debtor's motion to extend to exclusive period filed. ORDERED that show cause order is vacated and matter to be had on 3-28-88 at 9:30 a.m.
03/22/88	Notice of above mailed. (66)
03/23/88	Debtor's motion to extend exclusive period set for hearing 3-28-88 at 9:30 a.m.

Date of Filing	Proceedings
08/01/88	Memorandum opinion filed.
08/01/88	ORDERED that debtor granted 10 days to reconvert this case to Chapter 7 case and if no conversion received, this case shall be dismissed.
07/29/88	Certification of noticing fees and bills for collection filed; total for copies \$12.50 and paid 8-5-88.
08/10/88	Debtor's request for extension of time until 8-20-88 to elect to convert or dismiss case filed and SO ORDERED by Judge. Debtor's request for extension of time, until 8-31-88, to file notice of appeal filed and SO ORDERED by Judge.
08/19/88	Amended certificate of noticing fees and bill for collection filed; total owed \$50.00. Paid.
03/31/88*	Notice of appearance filed by Leslie Davis.
08/30/88	Debtor's notice of appeal of order of 8-1-88 filed.
09/04/88	Designation of record on appeal filed.
10/07/88	Supplement to debtor's/appellant's designation of record on appeal filed.
10/14/88	Transcript on appeal of hearing on 3-28-88 filed. Transcript on appeal of hearing on 3-7-88 filed.
10/19/88	Notice of appeal transmitted to U.S.D.C. 88-2026-C(5)
05/08/90	ORDER that debtor file by 5-18-90 his motion to reconvert this case to Chapter 7 or this case shall be dismissed without further notice.

Date of Filing	Proceedings
05/17/90	ORDER that Court's order of 5-11-90 is set aside and Jonathan W. Belsky, to enter his appearance for debtor and debtor's counsel to advise Court within 5 days of entry of order granting or denying debtor's motion for rehearing <i>en banc</i> , currently pending in U.S. Court of Appeals and debtor to file monthly operating reports on a timely basis, all reports to be filed within 30 days of date of this order.
05/23/90	ORDER that Court's order of 5-11-90 is set aside and Jonathan W. Belsky to file entry of appearance in this Chapter 11 case and debtor's counsel to advise Court within 10 days of entry of order granting or denying debtor's motion for rehearing, <i>en banc</i> , currently pending in U.S. Court of Appeals and debtor to file monthly operating reports and to be filed for all months which this Chapter 11 has been pending.
05/24/90	ORDER that trustee authorized to pay Carl C. Lang, attorney for trustee, sum of \$1,696.25 for services rendered.
06/21/90	FINANCIAL reports for months ended 10-87, 10-89, 11-89, 12-89, 1-90, 2-90, 3-90, 4-90 and 5-90 filed.
06/18/90	ENTRY of special appearance by Jonathan W. Belsky on behalf of debtor for purposes stated in order of 5-23-90.
07/12/90	FINANCIAL report for month 06-01-90.
08/09/90	FINANCIAL report for month of 07/90.
09/05/90	FINANCIAL report for month of 08/90.
10/10/90	FINANCIAL report for month of 09/90.
11/06/90	FINANCIAL report for month of 10/90.
12/12/90	FINANCIAL report for month of 11/90.
01/07/91	FINANCIAL report for month of 12/90.
02/08/91	FINANCIAL report for month of 01/91.

Date of Filing	Proceedings
United States District Court	
10/19/88	CAUSE TRANSFERRED FROM U.S. BANKRUPTCY COURT w/attached Designation of Record, Certified copy of Docket Sheets, 2 Transcripts dated 3/7/88 and 3/28/88 and exhibits. (EOD 10/23/88)
11/03/88	Motion for extension of time to file brief filed by Debtor/Appellant. EXTENSION OF TIME GRANTED UNTIL 12/4/88 to file brief (EOD 11/9/88)
12/05/88	ENTRY of Appearance by Jonathan Belsky on behalf of the Appellant/Debtor Sheldon B. Toibb filed. (EOD 12/29/88) EXTENSION OF TIME GRANTED UNTIL 1/5/89 to file brief filed by appellant/debtor Toibb filed. (EOD 12/29/88)
01/05/89	EXTENSION OF TIME GRANTED UNTIL 2/1/89 to file Appellant's trial brief filed by Appellant (EOD 1/9/88)
02/03/89	BRIEF IN BEHALF OF DEBTOR-APPELLANT Sheldon Baruch Toibb, filed. (EOD 2/8/89)
02/22/89	Bankruptcy appeal filed 10/19/88 submitted to Judge Limbaugh (EOD 2/21/89)
05/19/89	ORDER (SNL), filed. IT IS HEREBY ORDERED that the Order of the United States Bankruptcy Court for the Eastern District of Missouri dismissing Debtor Reorganization Case under Chapter 11 of the Bankruptcy Code is AFFIRMED. MEMORANDUM filed this date. (EOD 5/19/89)
06/19/89	NOTICE of Appeal [of 5/19/89 order], filed by debtor. (FEE PAID) (Ref: 89- EM) EOD 06/19/89)

Date of Filing	Proceedings
06/19/89	Notice of Appeal, Notice of Appeal Supplement, docket sheets and entire file delivered to Appeals Clerk for processing.
07/06/89	DELIVERED TO U.S.C.A.—2 certified copies of Notice of Appeal, 2 certified copies of Clerk's Docket Entries, Notice of Appeal Supplement, Docket Fee notification form, and 2 copies of ORDER/MEMORANDUM (SNL) filed 5/19/89. cc: Notice of Appeal to Judge Limbaugh. CC: Notice of Appeal, Clerk's Docket Entries and U.S.C.A. letter of 10/19/84, to attorneys of record. (EOD 7/7/89)
07/12/89	Receipt of notice of appeal and appeal briefing schedule filed by U.S.C.A. (EOD 7/13/89)
01/12/90	Exhibit receipt filed exhibits received by counsel for plaintiff (EOD 1/12/90)
05/02/90	OPINION (U.S.C.A.) filed affirmed. (EOD 5/4/90)
05/11/90	ORDER (U.S.C.A.) filed petition for rehearing and is DENIED. Rehearing by the panel is also DENIED. (EOD 6/12/90)
06/15/90	JUDGMENT (U.S.C.A.) It is ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this court. (EOD 6/18/90)
07/02/90	ORDER (U.S.C.A.) filed. Appellant's motion to stay or recall the mandate pending the filing of a petition for writ of certiorari with the U.S. Supreme Court has been considered by the court and is DENIED. (EOD 7/5/90)
09/07/90	Notice of Filing Petition for Certiorari filed by U.S.C.A. (EOD 9/6/90)

Date of Filing	Proceedings
United States Court of Appeals	
07/11/89	DOCKETED APPEAL
07/11/89	Certified copies notice of appeal, docket entries and judgment of 5/19/89 from District Court. (1)
07/11/89	BRIEFING SCHEDULE: Method of Appendix 7/21/89; DR Appellant 7/21/89; DR Appellee 7/31/89; Trans na; Appendix & Brief Appellant 8/31/89; Brief Appellee 10/2/89; Reply Brief 10/16/89.
07/11/89	TO SETTLEMENT CONFERENCE.
07/14/89	APPEARANCE for appellant. (2)
09/01/89	MOTION by appellant for extension of time to file brief—MOTION GRANTED IN PART to 9/21/89 on 9/1/89. (3)
09/20/89	MOTION by appellant for extension of time to file brief—MOTION GRANTED to 9/26/89 on 9/20/89. (4)
09/26/89	BRIEF OF APPELLANT w/Addendum: w/ser 9/26 7 copies (20pp) (5)
11/20/89	DOCKET NOTE: Appellee notified that brief shall be due by 12/5/89 or order will be entered enjoining him from filing a brief or participating in oral argument.
11/24/89	DOCKET NOTE: No Appellee Brief will be filed.
11/28/89	TO SCREENING.
11/29/89	RETURNED FROM SCREENING—10 min.
03/12/90	**SET FOR ARGUMENT** APRIL IN ST. LOUIS.

Date of Filing	Proceedings
04/12/90	SUBMITTED ON THE BRIEFS WITHOUT ORAL ARGUMENT TO JUDGES ARNOLD, ROSS AND FAGG.
05/02/90	OPINION PER CURIAM PUBLISHED. (6)
05/02/90	JUDGMENT: The judgment of the district court is affirmed in accordance with the opinion. See 8th Cir. R. 47B. (7)
05/16/90	PETITION FOR REHEARING with suggestion for rehearing en banc filed by appellant. (8)
06/08/90	ORDER: Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Petition for rehearing by the panel is also denied. (9)
06/15/90	MANDATE ISSUED.
06/18/90	RECEIPT FOR MANDATE. (10)
06/21/90	MOTION to Stay or Recall mandate Pending Application to the Supreme Court for Writ of Certiorari filed by appellant. (11)
06/29/90	ORDER: Appellant's motion to stay or recall the mandate pending the filing of a writ of certiorari with the Supreme Court is denied. (12)
09/05/90	NOTICE OF FILING of petition for writ of certiorari with the U.S. Supreme Court as Case No. 90-368 on 8-2-90. (13)
01/28/91	CERTIFIED COPY OF Supreme Court order granting certiorari in 90-368. (14)

Date of Filing	Proceedings
United States Supreme Court	
08/02/90	Petition for Writ of Certiorari to the United States Court of Appeals, Eighth Circuit, filed by Sheldon Baruch Toibb <i>Pro Se</i> .
01/18/91	Order Granting Petition for Writ of Certiorari.

Debtor selects the following property as exempt pursuant to 11 U.S.C. § 522(d) [or the laws of the State of Missouri]

Schedule B-4.—Property claimed as exempt

Type of property	Location, description, and, so far as relevant to the claim of exemption, present use of property	Specify statute creating the exemption	Value claimed exempt
Household goods and wearing apparel	Debtor's possession	513.430(1) RSMo.	\$1,000.00
Equity, if any, in 1980 Toyota Celica GT	Debtor's possession	513.430(5) RSMo.	500.00
Debtor's interest in bank accounts, cash on hand, pre-bankruptcy earnings, excess equity in automobile, and any other assets in which Debtor claims an interest	Debtor's possession	513.430(3) RSMo.	400.00
Total			1,900.00

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881(3)

IN RE: SHELDON B. TOIBB,
Debtor.

NOTICE TO CREDITORS

TO: ALL CREDITORS AND OTHER PARTIES IN
INTEREST.

PLEASE BE ADVISED that among the assets scheduled by Sheldon Toibb in his bankruptcy schedules was 400 shares of stock held by Mr. Toibb in Independence Electric Corporation ("IEC"). IEC is a privately held corporation in which Mr. Toibb held a minority interest, organized to explore various ventures in energy development and related fields. The Trustee has now received an offer from the Board of Directors of IEC to purchase Mr. Toibb's minority stock interest in the corporation for the sum of \$25,000.00. Given the fact that IEC has not shown a profit in the last five years, and given the fact that there is no ready market for said stock, the Trustee believes that the offer submitted by IEC is fair and reasonable.

ACCORDINGLY, TAKE NOTICE that the Trustee will proceed to consummate said sale to IEC for the sum of \$25,000.00, unless meritorious objection be filed in writing within 20 days of the date of this Notice, with the Clerk of the Bankruptcy Court, 1114 Market Street, St. Louis, MO 63101, with a copy to the undersigned.

Dated at St. Louis, Missouri on this 6th day of August, 1987.

/s/ Carl C. Lang
CARL C. LANG
Attorney for Trustee
7777 Bonhomme, 14th Floor
Clayton, Missouri 63105

/s/ Stuart J. Radloff
STUART J. RADLOFF
Trustee

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-(3)

IN RE: SHELDON B. TOIBB,

Debtor.

PETITION TO CONVERT TO CHAPTER 11

Sheldon B. Toibb, by his undersigned counsel, hereby petitions, pursuant to Section 706 of the Bankruptcy Code, 11 U.S.C. § 706(a), to convert this case to a case under Chapter 11 of the Bankruptcy Code. In support of this petition, the Debtor states the following:

1. On November 18, 1986, the Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code.
2. This case has not been converted under Section 1112, 1307 or 1208 of the Bankruptcy Code.
3. The Debtor is eligible to be a debtor under Chapter 11 of the Code and desires to convert this case to a case under Chapter 11.

WHEREFORE, the Debtor prays that an order of relief be entered under Chapter 11 of Title 11 of the United States Code.

PEPER, MARTIN, JENSEN, MAICHEL
AND HETLAGE

By: /s/ Audrey G. Fleissig
AUDREY G. FLEISSIG
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
Telephone: (314) 421-3850
Attorneys for Debtor

STATE OF MISSOURI)
) ss.
 COUNTY OF ST. LOUIS)

Sheldon B. Toibb, being first duly sworn, do state that I have read the foregoing Petition to Convert to Chapter 11, and that the statements contained therein are true and correct to the best of my knowledge and belief.

/s/ Sheldon B. Toibb
 SHELDON B. TOIBB

SUBSCRIBED AND SWORN TO BEFORE ME this
 18th day of September, 1987.

/s/ Sue Welsh
 Notary Public

My Commission Expires:

Sue Welsh
 Notary Public, State of Missouri
 [Illegible]

[Certificate of Service Omitted in Printing]

UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF MISSOURI
 EASTERN DIVISION

 Cause No. 86-02881 (3)

IN RE: SHELDON BARUCH TOIBB,
Debtor.

**OBJECTIONS OF DEBTOR TO
 PROPOSED SALE OF DEBTOR'S COMMON STOCK
 IN INDEPENDENCE ELECTRIC CORPORATION**

Sheldon B. Toibb, debtor herein, hereby objects to the proposed sale of debtor's 400 shares of common stock in Independence Electric Corporation ("IEC"), on the grounds that the debtor has petitioned to convert this case to a case under Chapter 11, and is therefore entitled to deal with the stock pursuant to a plan of reorganization. Moreover debtor states that the sale proposed by the trustee should not be approved, in any event, because any sale of the Debtor's interest in IEC to IEC or its directors would be unjust and inequitable, and because both the offer received and the sale proposed violate the applicable Delaware law.

In support of his objections, the Debtors states the following:

1. The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on November 18, 1986.
2. The petition was filed, in part, because the Debtor had been informed by the two other shareholders of IEC, who together hold the majority of the shares and are the only remaining directors of IEC, that they had decided to abandon the operations of the corporation.

3. Based upon the representations of the other shareholders/directors of IEC, the Debtor believed that his 400 shares of IEC had absolutely no value.

4. Months after the bankruptcy petition was filed, the Debtor discovered that contrary to their assertions, the directors and officers of IEC did not abandon the operations of the corporation. Indeed, the Debtor recently learned that on August 5, 1987, one day prior to the date the Trustee sent Notice to all creditors of the proposed sale of the stock to the Board of Directors of IEC, IEC was granted a license application that was pending well prior to the date the Debtor filed his petition in bankruptcy.

5. Although the value of IEC as an ongoing concern remains highly speculative, Debtor now believes that IEC may have some value.

6. On September 21, 1987, the Debtor filed a petition to convert this action to an action under Chapter 11 of the Bankruptcy Code. Inasmuch as this case has not previously been converted under Section 1112, 1307 or 1208 of the Bankruptcy Code, the debtor's right to convert the case at this time is absolute.

7. The Debtor now believes that this is an appropriate case for reorganization under Chapter 11, and under Chapter 11, the Debtor is entitled to deal with the assets of the Debtor pursuant to a plan of reorganization, including the 400 shares of stock in IEC.

8. For this reason alone, the Trustee's motion to sell the assets should at this time be denied as moot.

9. In the alternative, any sale to IEC or its directors should be denied, in any event, for three additional reasons. First, such a sale would not be fair and equitable. The debtor is a minority shareholder in IEC, holding 24% of the stock of the corporation. The proposed pur-

chase by IEC or its shareholders is nothing more than a continuation of an unfair, improper and illegal scheme by the majority shareholders to exclude the debtor from the corporation.

10. A sale of the debtor's stock to the two remaining shareholders or to the corporation would have the effect of sanctioning and consummating the illegal scheme. For this reason, IEC and its shareholders should be disqualified as purchasers of the debtor's stock in IEC.

11. Second, the proposed offer was not validly made. The corporate charter of IEC requires that there be three members of the Board of Directors, and that any vacancy be filled by the shareholders at a meeting duly called for that purpose. The debtor was removed from the Board of Directors in late 1986. Since that time, there has not been a meeting of shareholders for the purpose of filling the vacancy on the Board. Consequently, there exists no validly constituted Board of Directors authorized to make the offer and purchase of stock presently proposed.

12. Finally, on information and belief, IEC's debts currently exceed its assets. Consequently, any redemption by IEC of its own shares while undercapitalized would violate Chapter 160 of the Delaware Code and is therefore prohibited and would constitute a fraud against IEC's own creditors.

Accordingly, the Debtor respectfully requests that the proposed sale of Debtor's stock in IEC be denied based upon Debtor's conversion of this case to a case under Chapter 11, in order to permit the Debtor a fair opportunity to reorganize his affairs. In the alternative, the debtor requests that any proposed sale be denied on the ground that the offer was not validly made and the sale would violate Delaware law, and that the Court further disqualify IEC and its remaining shareholders, officers

and directors from any purchase, on the ground that any sale to such parties would be unjust and inequitable.

PEPER, MARTIN, JENSEN, MAICHEL
AND HETLAGE

By /s/ Audrey G. Fleissig
LEWIS R. MILLS
AUDREY G. FLEISSIG
720 Olive Street, 24th Floor
St. Louis, MO 63101
(314) 421-3850

Copies of the foregoing mailed this 21st day of September, 1987, to:

Stuart J. Radloff
Trustee
7777 Bonhomme Ave., 14th Floor
St. Louis, MO 63105

Carl L. Lang
Attorney for the Trustee
7777 Bonhomme Ave., 14th Floor
St. Louis, MO 63105

Arthur J. Galligan
Attorney for Objector
2101 L. Street, N.W.
Washington, D.C. 20037

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE SHELDON B. TOIBB,
Debtor

ORDER

At St. Louis, in this District, this 2nd day of October, 1987.

The Objection To Sale Of Debtor's Stockholdings In Independence Electric Corporation, filed August 26, 1987, by Arthur J. Galligan, came on for hearing on September 30, 1987. Debtor's counsel appeared prior to the call of the docket and filed Debtor's Petition To Convert To Chapter 11, and announced no opposition to the Petition To Convert from the Trustee, Stuart J. Radloff, or the Objector, Arthur J. Galligan. Upon said announcement and review of the record in this case, it is

ORDERED that Debtor's Petition To Convert To Chapter 11 be and it hereby is GRANTED, and that this Order constitute an order for relief under Chapter 11, Debtor being directed by this Order to file, on or before October 16, 1987, his Chapter 11 Statement of Affairs and Schedules and his Schedule of Twenty (20) Largest Unsecured Creditors; and

That Stuart J. Radloff be and he hereby is discharged of his trust as Chapter 7 Trustee in this case and the surety on his blanket bond is released from any further liability thereunder in this case.

IT IS FURTHER ORDERED that

(1) Debtor comply with the provisions of Bankruptcy Rule 2015 (effective August 1, 1983);

(2) The complete inventory required to be filed by Rule 2015(a) (1), be filed on or before October 16, 1987, and state, as to the items of property so described in said inventory, the value thereof, whether encumbered, and, if so, to identify the entity (by name and address including the zip code) holding the encumbrance, and stating the amount of the secured debt secured by each such encumbrance described;

(3) The reports and summaries required by 11 U.S.C. 704(7) [designated as 11 U.S.C. 704(8) by the Bankruptcy Amendments and Judgeship Act of 1984] and by Bankruptcy Rule 2015(a) (3), be filed monthly, the first of such reports to be filed on or before November 15, 1987, to embrace the period between October 2, 1987, and October 31, 1987; and each successive monthly report thereafter to be filed on or before the 15th day of each succeeding month, to embrace the period of the calendar month immediately preceding the due date of such report;

(4) The reports required to be filed by this Order, and by said 11 U.S.C. 704(7) [or (8), as the case may be,] and by Bankruptcy Rule 2015(a), include not only statements of receipts and disbursements (as by Section 704 is required), and not only statements complying with Bankruptcy Rule 2015(a) (3), but also include a profit and loss statement, and a statement describing each debt incurred during the reporting period and remaining unpaid at the end of said reporting period;

(5) Each such report be filed, in duplicate, and that a copy of each such report be mailed (on the date of filing) to each member of the Official Creditors Committee and to Chief, Special Procedures Section, Internal Revenue Serv-

ice, P. O. Box 1457, H. W. Wheeler Station, St. Louis, MO, 63188;

(6) Debtor file his Disclosure Statement and Plan of Reorganization on or before February 2, 1988, unless such time is extended by Order of this Court; failure to file such Statement and Plan within such time may be grounds for conversion or dismissal; and

(7) Debtor submit to this Court, for review and approval, all notices to creditors and parties in interest prior to mailing.

Barry S. Schermer
BARRY S. SCHERMER
United States Bankruptcy Judge

Copy mailed to:

Sheldon Baruch Toibb
Debtor
8640 Olive Blvd.—Apt. A
St. Louis, MO 63132

Audrey G. Fleissig
Attorney for Debtor
720 Olive—24th Floor
St. Louis, MO 63101

Stuart J. Radloff
Chapter 7 Trustee
7777 Bonhomme—14th Floor
Clayton, MO 63105

Chief, Special Procedures Section
Internal Revenue Service
P. O. 1457—H. W. Wheeler Station
St. Louis, MO 63188

Arthur J. Galligan
Objector
2101 L Street N. W.
Washington, DC 20037

STATEMENT OF FINANCIAL AFFAIRS FOR
DEBTOR ENGAGED IN BUSINESS

UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF MISSOURI

Case No. 86-02881 (3)

IN RE SHELDON BARUCH TOIBB

Debtor [set forth here all names including trade names
used by Debtor within last 6 years]

Social Security Number 494-50-3162 and Debtor's Em-
ployer's Tax Identification No.

Statement of Financial Affairs for Debtor Engaged in Business

[Each question shall be answered or the failure to answer ex-
plained. If the answer is "none" or "not applicable," so state. If
additional space is needed for the answer to any question, a separate
sheet properly identified and made a part hereof, should be used and
attached.

If the debtor is a partnership or a corporation, the questions shall
be deemed to be addressed to, and shall be answered on behalf of,
the partnership or corporation; and the statement shall be certified
by a member of the partnership or by a duly authorized officer of
the corporation.

The term, "original petition," used in the following questions,
shall mean the petition filed under Rule 1002, 1003, or 1004.]

1. *Nature, location, and name of business*

a. Under what name and where do you carry on
your business?

Sheldon B. Toibb

b. In what business are you engaged? (If business
operations have been terminated, give the date of
termination.)

Energy Consultant; Private Fundraiser

c. When did you commence the business?

Consultant, 1983

d. Where else, and under what other names, have
you carried on business within the six years im-
mediately preceding the filing of the original petition
herein? (Give street addresses, the names of any
partners, joint adventurers, or other associates, the
nature of the business, and the periods for which it
was carried on.)

Independence Electric Corporation,
1983-1986 Washington, D.C.

Alternative Energy Project Developer

2. *Books and records.*

a. By whom, or under whose supervision, have your
books of account and records been kept during the
six years immediately preceding the filing of the
original petition herein? (Give names, addresses, and
periods of time.)

Debtor's

b. By whom have your books of account and records
been audited during the six years immediately pre-
ceding the filing of the original petition herein?
(Give names, addresses, and dates of audits.)

N/A

c. In whose possession are your books of account and
records? (Give names and addresses.)

Debtor's possession

d. If any of these books or records are not available, explain.

N/A

e. Have any books of account or records relating to your affairs been destroyed, lost, or otherwise disposed of within the two years immediately preceding the filing of the original petition herein? (If so, give particulars, including date of destruction, loss, or disposition, and reason therefor.)

No

3. *Financial statements.*

Have you issued any written financial statement within the two years immediately preceding the filing of the original petition herein? (Give dates, and the name and addresses of the persons to whom issued, including mercantile and trade agencies.)

No

4. *Inventories.*

a. When was the last inventory of your property taken?

b. By whom, or under whose supervision, was this inventory taken?

c. What was the amount, in dollars, of the inventory? (State whether the inventory was taken as cost, market, or otherwise.)

d. When was the next prior inventory of your property taken?

e. By whom, or under whose supervision, was this inventory taken?

f. What was the amount, in dollars, of the inventory? (State whether the inventory was taken at cost, market, or otherwise.)

g. In whose possession are the records of the two inventories above referred to? (Give names and addresses.)

N/A

5. *Income other than from operation of business.*

What amount of income, other than from operation of your business, have you received during each of the two years immediately preceding the filing of the original petition herein? (Give particulars, including each source, and the amount received therefrom.)

1986—\$500.00: Eastern Missouri Psychiatric Association; 1987—\$100.00: Levin Brothers Poultry Company

6. *Tax returns and refunds.*

a. In whose possession are copies of your federal, state and municipal income tax returns for the three years immediately preceding the filing of the original petition herein?

Debtor's Possession

b. What tax refunds (income or other) have you received during the two years immediately preceding the filing of the original petition herein?

District of Columbia \$527.00

State of Maryland \$574.00

District of Columbia, \$286.00

c. To what tax refunds (income or other), if any, are you, or may you be, entitled? (Give particulars, including information as to any refund payable jointly to you and your spouse or any other person.)

None

7. *Financial accounts, certificates of deposit and safe deposit boxes.*

a. What accounts or certificates of deposit or shares in banks, savings and loan, thrift, building and loan and homestead associations, credit unions, brokerage houses, pension funds and the like have you maintained, alone or together with any other person, and in your own or any other name, within the two years immediately preceding the filing of the original petition herein? (Give the name and address of each institution, the name and number under which the account of certificate is maintained, and the name and address of every person authorized to make withdrawals from such account.)

First American Bank of Washington
3700 Calvert Street, N.W.,
Washington, D.C. 20057
Checking Account No. 5-249-769

b. What safe deposit box or boxes or other depository or depositories have you kept or used for your securities, cash, or other valuables within the two years immediately preceding the filing of the original petition herein? (Give the name and address of the bank or other depository, the name in which each box or other depository was kept, the name and address of every person who had the right of access thereto, a description of the contents thereof, and, if the box has been surrendered, state when surrendered or, if transferred, when transferred, and the name and address of the transferee.)

None

8. *Property held for another person.*

What property do you hold for any other person? (Give name and address of each person, and describe the property, the amount or value thereof and all writing relating thereto.)

None

9. *Property held by another person.*

Is any other person holding anything of value in which you have an interest? (Give name and address, location and description of the property, and circumstances of the holding.)

Yes. Stieferman Brothers Van & Storage
10899 Indian Head Industrial Blvd.
St. Louis, MO 63132
Books and Furniture

10. *Prior bankruptcy proceedings.*

What cases under the bankruptcy Act or title 11, United States Code have previously been brought by or against you? (State the location of the bankruptcy court, the nature and number of the case, and whether a discharge was granted or denied, the case was dismissed, or a composition, arrangement, or plan was confirmed.)

None; this case converted from Chapter 7.

1. *Receiverships, general assignments, and other modes of liquidation.*

a. Was any of your property, at the time of the filing of the original petition herein, in the hands of a receiver, trustee, or other liquidating agent? (If so, give a brief description of the property and the name and address of the receiver, trustee, or other agent, if the agent was appointed in a court proceeding, the name and location of the court, the title and number of the case, and the nature thereof.)

No

b. Have you made any assignment of your property for the benefit of your creditors, or any general settlement with your creditors, within the two years immediately preceding the filing of the original petition?

tion herein? (If so, give dates, the name and address of the assignee, and a brief statement of the terms of assignment or settlement.)

No.

2. *Suits, executions, and attachments.*

a. Were you a party to any suit pending at the time of the filing of the original petition herein? (If so, give the name and location of the court and the title and nature of the proceeding.)

a) Yes.

1. Superior Court of the District of Columbia; First Virginia Bank, Plaintiff; Case #CA04699-86 amounts claimed on Visa card —\$6,379.04.
2. Sovran Bank, N.A. v. Sheldon Toibb; Norfolk General District Court, Norfolk, Va., Cause No. V8658998; amounts claimed on Visa and Mastercard—\$5,521.13.

b. Were you a party to any suit terminated within the year immediately preceding the filing of the original petition herein? (If so, give the name and location of the court, the title and nature of the proceeding, and the result.)

b) No.

c. Has any of your property been attached, garnished, or seized under any legal or equitable process within the year immediately preceding the filing of the original petition herein? (If so, describe the property seized or person garnished, and at whose suit.)

c) No.

3. a. *Payments of loans, installment purchases and other debts.*

What payments in whole or in part have you made during the year immediately preceding the filing of the original petition herein on any of the following: (1) loans; (2) installment purchases of goods and services; and (3) other debts? (Give the names and addresses of the persons receiving payment, the amounts of the loans or other debts and of the purchase price of the goods and services, the dates of the original transactions, the amounts and dates of payments, and, if any of the payees are your relatives or insiders, the relationship; if the debtor is a partnership and any of the payees is or was a partner or a relative of a partner, state the relationship; if the debtor is a corporation and any of the payees is or was an officer, director, or stockholder, or a relative of an officer, director, or stockholder, state the relationship.)

No payments by Debtor on loans, installment purchases or debts.

No payments to insiders.

b. *Setoffs.*

What debts have you owed to any creditor, including any bank, which were setoff by that creditor against a debt or deposit owing by the creditor to you during the year immediately preceding the filing of the original petition herein? (Give the names and addresses of the persons setting off such debts, the dates of the setoffs, the amounts of the debts owing by you and to you and, if any of the creditors are your relatives or insiders, the relationship.)

IRS has set off Debtor's income tax refund against taxes owed.

4. *Transfers of property.*

a. Have you made any gifts, other than ordinary and usual presents to family members and charitable donations during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of donees and dates, description, and value of gifts.)

No.

b. Have you made any other transfer, absolute or for the purpose of security, or any other disposition which was not in the ordinary course of business during the year immediately preceding the filing of the original petition herein? (Give a description of the property, the date of the transfer or disposition, to whom transferred or how disposed of, and state whether the transferee is a relative, partner, shareholder, officer, director or insider, the consideration, if any, received for the property, and the disposition of such consideration.)

No.

5. *Accounts and other receivables.*

Have you assigned, either absolutely or as security, any of your accounts or other receivables during the year immediately preceding the filing of the original petition herein? (If so, give names and addresses of assignees.)

No.

6. *Repossessions and returns.*

Has any property been returned to, or repossessed by, the seller, lessor, or a secured party during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including

the name and address of the party getting the property and its description and value.)

No.

7. *Business leases.*

If you are a tenant of business property, what is the name and address of your landlord, the amount of your rental, the date to which rent had been paid at the time of the filing of the original petition herein, and the amount of security held by the landlord?

N/A

8. *Losses.*

a. Have you suffered any losses from fire, theft, or gambling during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including dates, names, and places and the amounts of money or value and general description of property lost.)

No

b. Was the loss covered in whole or part by insurance? (If so, give particulars.)

N/A

9. *Withdrawals.*

a. If you are an individual proprietor of your business, what personal withdrawals of any kind have you made from the business during the year immediately preceding the filing of the original petition herein?

None

b. If the debtor is a partnership or corporation, what withdrawals, in any form (including compen-

sation, bonuses or loans), have been made or received by any member of the partnership, or by any officer, director, managing executive, or shareholder of the corporation, during the year immediately preceding the filing of the original petition herein? (Give the name and designation or relationship to the debtor of each person, the dates and amounts of withdrawals, and the nature or purpose thereof.)

10. *Payments or transfers to attorneys.*

a. Have you consulted an attorney during the year immediately preceding or since the filing of the original petition herein? (Give date, name, and address.)

a) Yes.

- 1) A. Thomas DeWoskin, 7711 Carondelet Avenue, 10th Floor, St. Louis, MO 63105; during course of Chapter 7 proceeding
- 2) Audrey G. Fleissig, 720 Olive Street 24th Floor, St. Louis, MO 63101

b. Have you during the year immediately preceding or since the filing of the original petition herein paid any money or transferred any property to the attorney, or to any other person on his behalf? (If so, give particulars, including amount paid or value of property transferred and date of payment or transfer.)

b) Yes.

- 1) Peper, Martin, Jensen, Maichel and Hetlage—\$4,000 retainer.

c. Have you, either during the year immediately preceding or since the filing of the original petition herein, agreed to pay any money or transfer any property to an attorney at law, or to any other

person on his behalf? (If so, give particulars, including amount and terms of obligation.)

c) No, except as above.

(If the debtor is a partnership or corporation, the following additional questions should be answered.)

11. *Members of partnership; officers, directors, managers, and principal stockholders of corporation.*

a. What is the name and address of each member of the partnership, or the name, title, and address of each officer, director, insider, and managing executive, and of each stockholder holding 20 percent or more of the issued and outstanding stock, of the corporation?

b. During the year immediately preceding the filing of the original petition herein, has any member withdrawn from the partnership, or any officer, director, insider, or managing executive of the corporation terminated his relationship, or any stockholder holding 20 percent or more of the issued stock disposed of more than 50 percent of his holdings? (If so, give name and address and reason for withdrawal, termination, or disposition, if known.)

c. Has any person acquired or disposed of 20 percent or more of the stock of the corporation during the year immediately preceding the filing of the petition? (If so, give name and address and particulars.)

I, _____, declare under penalty of perjury that I have read the answers contained in the foregoing statement of affairs and that they are true and correct to the best of my knowledge, information, and belief. Executed on _____

Signature: _____

ADVISORY COMMITTEE NOTE

Many of the questions on this form are the same as on Form No. 7. Statement of Financial Affairs for Debtor Not Engaged in Business.

The question regarding loans repaid (#13) includes installment credit sales of goods or services. The information is helpful with respect to possible preferences.

Information regarding leases (#17) may be helpful with respect to lease termination or extension and whether the landlord may be holding a deposit.

AMENDED
SCHEDULES OF ASSETS AND LIABILITIES
UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF MISSOURI

Case No. 86-02881 (3)

IN RE: SHELDON BARUCH TOIBB

Debtor [set forth here all names including trade names used by Debtor within last 6 years].

Social Security Number 494-50-3162

and Debtor's Employer's Tax Identification No. _____

Schedule A—Statement of All Liabilities of Debtor.

Schedules A-1, A-2, and A-3 must include all the claims against the debtor or his property as of the date of the filing of the petition by or against him.

Schedule A-1.—Creditors having priority.

Nature of claim.	Name of creditor and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is subject to setoff, evidenced by a judgment, negotiating, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
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a. Wages, salary, and commissions, including vacation, severance and sick leave pay owing to employees not exceeding \$2,000 to each, earned within 90 days before filing of petition or cessation of business (if earlier specify date).	NONE			\$ -0-
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b. Contributions to employee benefit plans for services rendered within 180 days before filing of petition or cessation of business (if earlier specify date).

NONE

-0-

c. Deposits by individuals, not exceeding \$900 for each for purchase, lease, or rental of property or services for personal, family, or household use that were not delivered or provided.

NONE

-0-

d. Taxes owing [itemize by type of tax and taxing authority].

(1) To the United States	1) Internal Revenue Service Philadelphia, PA	Interest & penalty claimed on taxed owed; incurred March 1985;	Disputed	4,200.63
(2) To any state	2) NONE			-0-
(3) To any other taxing authority	3) NONE			-0-
Total				4,200.63

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Schedule A-2—Creditors Holding Security.

Name of creditor and complete mailing address including zip code.	Description of security and date when obtained by creditor.	Specify when claim was in- curred and the considera- tion therefor; when claim is subject to setoff, evi- denced by a judgment, ne- gotiable instrument, or other writing, or incurred as partner or joint con- tractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim without deduction of value of security.	Market value.
				\$	\$ unknown

IRS may claim tax lien, see Schedule A-1 (d)

IRS may claim tax lien, see Schedule A-1 (d)

Total

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
American Express Travel Related Services Co., Inc. 777 American Expressway Fort Lauderdale FL 33337 Acct. # 3728-308263-91005 and Capitol Credit Corp. 1320 Fenwick Lane, #207 Silver Springs MD 20910	Charge card incurred February 1986		6,465.02
Amoco Oil Company Acct. # 457-204-222-6 and Diner's Club International Acct. # 3045-720422-2679 P. O. Box 9014 Des Moines IA 50306 and	Collection of above credit card charges held with American Express		
	Charge cards incurred 1983		1,211.26

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Capitol Credit Corp. 1320 Fenwick Lane, #207 Silver Springs MD 20910 and Great Lakes Collection Bureau, Inc. 625 Delaware Ave. Buffalo NY 14202 Bank of America Bank Card Center P. O. Box 94116 Pasadena CA 91109 Acct. # 4024-0238-1007-1643 and American Creditor's Bureau of Maryland, Inc. 1738 Elton Rd., Suites 133-135 Silver Springs MD 20903	Collection of above credit card charges		
	Collection of above credit card charges		
	Visa charge card incurred 1983		8,082.01
	Collection of above credit charges held with Bank of America		

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Banc One Department 0553 Columbus OH 43271 Acct. # 4387-947-620-909 Beneficial National Bank, U.S.A. P. O. Box 1750 Wilmington DE 19899-1750 Acct. # 5212-0980-2010-1750 Acct. # 4170-7570-0000-4201 and National Financial System 371 Merrick Rd. Rockville Centre NY 11520 and Allied Bond & Collection Agency 4800 Street Rd. Trevose PA 19047 ID # 212-7599-0584-2369 Key # 1366-4767-9 Boatmen's Bank Bank Card Center P. O. Box 7402 St. Louis MO 63177 Acct. # 5151-4025-0027-1311 and GC Services Corp. Collection Agency Division P. O. Box 16947 Greensboro NC 27416	Visa charge card incurred 1983		4,004.35
	MasterCard charge card and Visa charge card incurred 1983		12,170.40
	Collection of above MasterCard and Visa charges held with Beneficial Nt'l. Bank		
	Collection of above MasterCard and Visa charges held with Beneficial Nt'l. Bank Disputed.		2,676.98 (note: disputed)
	MasterCard charge card incurred 1983		1,175.67
	Collection of above Mastercard charges held with Boatmen's Bank		

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Schedule A-3—Creditors having unsecured claims without priority.

C & P Telephone Co. A Bell Atlantic Company P. O. Box 27282 Richmond VA 23272-0001 Acct. # 202-364-8575-965 and C & P Telephone Co. A Bell Atlantic Company P. O. Box 657 Baltimore MD 21265-0001 Acct. 202-364-8575-965	Telephone bill incurred 1986	1,303.42
Centerre Bank Bank Card Department P. O. Box 391-MS75-01 St. Louis MO 63166 Acct. # 5151-3014-0020-1610	MasterCard charge card incurred 1983	1,219.12
Centerre Bank Bank Card Department P. O. Box 391-MS75-01 St. Louis MO 63166 Acct. # 4670-100-257-183	Visa charge card incurred 1983	1,464.18
Centerre Bank P. O. Box 391 St. Louis MO 63166 Loan # 00100116490676510	School loan incurred in 1972	2,045.68

Schedule A-3—Creditors having unsecured claims without priority.

4647

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
First American Bank of Virginia P. O. Box 1307 McLean VA 22101 Acct. # 4318-200-286-682	Visa charge card incurred 1982		6,067.39
First American Bank of Washington 3700 Calvert Street, N.W. Washington, D.C. 20007 Acct. # 5-249-769	Personal line of credit on checking account—incurred 1982		7,392.96
First National Bank of Chicago P. O. Box 4000 Uniondale NY 11553-0953 Acct. 5286-0080-2110-1008 Acct. # 4250-021-101-008 and American Creditor's Bureau of Maryland, Inc. 1738 Elton Rd., Suites 133-135 Silver Springs MD 20903	incurred 1983 Mastercard charge card Visa charge card		1,143.12
Collection of above Mastercard and Visa charges held by First National Bank of Chicago			

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First Omni Bank
Bank Card Center
P. O. Box 800
Millsboro DE 19966
Acct. 5262-1361-1070-7704
Acct. 4336-0061-1070-7704

First Virginia Bank
P. O. Box 807A
Falls Church VA 22046-1698
Acct. # 4332-0001-0679-4895

The Halladay Corporation
Suite 400
2121 Wisconsin Ave., N.W.
Washington, D.C. 20007
Acct. for Apt. No. 1117

Indiana National Bank
c/o Card Services
One Indiana Square
Indianapolis IN 46266
Acct. 4262-111-015-733
and
American Accounts, Inc.
One American Square
P. O. Box 1180
Anderson IN 46015

incurred 1983
Mastercard charge card
Visa charge card

Visa charge card incurred 1983

Bank rent—incurred 1986

Visa charge card incurred 1983

4,248.89

6,379.04

2,417.73

6,210.50

Collection of Visa charges held by Indiana National Bank

49

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Indiana National Bank c/o Card Services One Indiana Square Indianapolis IN 46266 Acct. #4262-111-014-363 and American Accounts, Inc. One American Square P. O. Box 1180 Anderson IN 46016 Maryland Bank, N.A. P. O. Bank 15020 Wilmington DE 1988509971 Acct. # 5329-0315-2800-8970 John J. McGrath, M.D. Suite 107 1616 18th St., N.W. Washington, D.C. 20009	Visa charge card incurred 1983 Collection of above Visa charges held by Indiana National Bank Mastercard charge card incurred 1983 Medical services, incurred 1985-1986		6,279.00 8,014.24 7,125.00

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MCI Telecommunications, Inc.
230 Schilling Plaza South
Hunt Valley MD 21031
Acct. # R2448300
and
North America Credit Assn.
ICM Division, Suite 204
40 Charles Lindbergh Blvd.
Uniondale NY 11553
and
North America Credit Assn.
9911 W. Pico Blvd., #1200
Los Angeles CA 90035-9990
Potomac Electric Power Company
P. O. Box 2812
Washington, D.C. 20067-2812
Acct. #0100-6545-32
and
Suburban Credit Corp.
P. O. Box 900
Annandale VA 22003
Royal Bank Mid-County and
Mercantile Bank & Trust Co.
Credit Card Center
P. O. Box 108
St. Louis MO 63166
Acct. #4672-571-910-456

1,500.24

51

333.59

6,932.75

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Shell Oil Company P. O. Box 33410 Louisville KY 40232 Acct. # 680 642 998	Gasoline and service charges incurred from approx. 3/87-10/2/87		622.50
Sovran Bank P. O. Box 11125 Richmond VA 23230 Acct. # 5314-5035-1073-2608	Mastercard charge card incurred 1983		2,752.67
Sovran Bank P. O. Box 11125 Richmond VA 23230 Acct. # 4368-0031-0555-2055	Visa Charge card incurred 1983		2,768.46

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Schedule B—Statement of All Property of Debtor

Schedules B-1, B-2, B-3 and B-4 must include all property of the debtor as of the date of the filing of the petition by or against him.

Schedule B-1.—Real Property

Description and location of all real property in which debtor has an interest (including deeds and future interests, interests in relating thereto). Nature of interest (specify all Market value of debtor's interest equitable and future interests, community property, life estates, lease-holds, and rights and powers exercisable for his own benefit). Deduction for secured claims listed in Schedule A-2 or exemptions claimed in Schedule B-4.

53

\$	None	-0-	
Total			-0-

Schedule B-2—Personal Property

Type of Property	Description and Location	Market value of debtor's interest without deduction for secured claims listed on Schedule A-2 or exemptions claimed in Schedule B-4
a.	Cash on hand	\$ 20.00
b.	Deposits of money with banking institutions, savings and loan associations, brokerage houses, credit unions, public utility companies, landlords and others	-0-
c.	Household goods, supplies and furnishings two rooms of furniture	100.00
d.	Books, pictures, and other art objects; stamp, coin and other collections	-0-
e.	Wearing apparel, jewelry, firearms, sports equipment and other personal possessions	250.00
f.	Automobiles, trucks, trailers and other vehicles 1980 Toyota Celica GT	800.00
g.	Boats, motors and their accessories	-0-
h.	Livestock, poultry and other animals	-0-
i.	Farming equipment, supplies and implements	-0-
j.	Office equipment, furnishings and supplies	-0-
k.	Machinery, fixtures, equipment and supplies [other than those listed in items j and l] used in business	-0-
l.	Inventory	-0-
m.	Tangible personal property of any other description	-0-
n.	Patents, copyrights, licenses, franchises and other general intangibles [specify all documents and writings relating thereto]	-0-
o.	Government and corporate bonds and other negotiable and nonnegotiable instruments	-0-

p.	Other liquidated debts owing debtor	-0-
q.	Contingent and unliquidated claims of every nature, including counterclaims of the debtor [give estimated value of each] possible claim against business associates for breach of duty to Debtor	unknown
r.	Interests in insurance policies [name insurance company of each policy and itemize surrender or return value of each]	-0-
s.	Annuities [itemize and name each issuer]	-0-
t.	Stock and interests in incorporated and unincorporated companies [itemize separately] 400 shares of Independence Electric Corporation	unknown
u.	Interests in partnerships	-0-
v.	Equitable and future interests, life estates, and rights or powers exercisable for the benefit of the debtor (other than those listed in Schedule B-1) [specify all written instruments relating thereto]	-0-
Total		\$1,170.00

Schedule B-3.—Property not otherwise scheduled

Type of property	Description and location	Market value of debtor's interest without deduction for secured claims listed in Schedule A-2 or exemption claimed in Schedule B-4
a. Property transferred under assignment for benefit of creditors, within 120 days prior to filing of petition [specify date of assignment, name and address of assignee, amount realized therefrom by the assignee, and disposition of proceeds so far as known to debtor]	None	\$ -0-
b. Property of any kind not otherwise scheduled	None	-0-
	Total	-0-

SCHEDULE OF CURRENT INCOME AND CURRENT EXPENDITURES

Name of Debtor SHELDON BARUCH TOIBB

EXPENSES

Estimate current monthly expenses of debtor (not including debts to be paid under a plan under chapter 11 or chapter 13 of the bankruptcy code) consisting of

Rent or home loan payment (include lot Rented for mobile home)	\$ -0-
Utilities	
Electricity	\$ -0-
Water	\$ -0-
Heat	\$ -0-
Telephone	\$50.00
Other	\$ -0-
Total Utilities	\$ 50.00
Food	\$400.00
Clothing	\$ -0-
Laundry & Cleaning	\$ 20.00
Newspapers, Periodicals & Books (school books)	\$ 50.00
Doctor & Medical Expenses	\$ 20.00
Transportation	(not including auto payments to be paid under a plan under chapter 11 or chapter 13 of the bankruptcy code).
Recreation, Club & Entertainment	\$ 50.00
Insurance (not deducted from wages)	
Auto	\$50.00
Life	\$ -0-
(medical) Other	\$52.00
Total Insurance	\$102.00
Taxes Not dedicated from wages or included in home loan payments	\$ -0-
If you pay or are liable for payment of alimony or support payments state monthly amount	\$ -0-
The name, age & relationship to you of persons for whose benefit payments are made	
Payments for support of additional dependents not living at your home	\$ -0-
Other (explain)	\$ -0-
Total estimated future monthly expenses	\$892.00

INCOME

Give Estimated Current Monthly Income Consisting Of

Debtor's take home pay (per month)	\$	-0-
Spouse's take home pay (per month)	\$	-0-
Regular income available from operation of business or profession	\$	uncertain
Do you receive any alimony or support payments? if so, state monthly amount	\$	-0-
The name, age & relationship to you of persons for whose benefit payments are received.		
Pension, social security or retirement income	\$	-0-
Other monthly income (parental support)		
Total Monthly income		\$892.00
Total Monthly expenses	\$892.00	
Am't of payment to the trustee (if applicable under Chapter 13 plan)	\$	N/A
Total of expenses and plan payment (if applicable)		\$892.00
Difference (if applicable under chapter 13 plan)		\$ N/A

DEPENDENTS

Number, age & relationship of dependants (except current spouse)
None

Compensation Paid or Promised to Attorney for Debtor

Have you paid or agreed to pay (or transfered or agreed to transfer any property) to your attorney for services in connection with your case other than agreeing to pay such compensation as may be allowed by the court to be paid by the trustee from monies paid to the trustee for your account? Yes ☐ No ☐

If the answer is yes, state the nature and the amount of compensation paid or promised and the source of the payment.

STATEMENT OF EXECUTORY CONTRACTS
UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF MISSOURI

Case No. _____

IN RE SHELDON BARUCH TOIBB,
Debtor

Include here all names used by debtor within last 6 years. Debtor

The debtor has the following executory contracts:

Stieferman Brothers Van & Storage Co. 10899 Indian Head Industrial Blvd. St. Louis, MO 63132	contract for moving and current storage of furniture
--	---

Dated October 19, 1987

Debtor

STATE OF MISSOURI)
 ss.:
COUNTY OF ST. LOUIS)

INDIVIDUAL: I, _____, the debtor named in the captioned case, do hereby declare that I have read the foregoing statements, that the statements contained therein are true according to the best of my knowledge, information, and belief.

CORPORATION: I, _____ the _____ of the corporation named as petitioner in the above captioned case, do hereby declare that I have read the foregoing statement, that the statements contained therein are true according to the best of my knowledge, infor-

mation, and belief, and that the filing of this statement on behalf of the corporation has been authorized.

PARTNERSHIP: I, _____ a member—authorized agent—of the partnership named as petitioner in the above case, do hereby declare that I have read the foregoing statement, that the statements contained therein are true, according to the best of my knowledge, information, and belief and that the filing of this statement on behalf of the partnership has been authorized.

Subscribed and sworn to before me on October 19, 1987

Debtor

Official Character

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881(3)

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

AMENDMENT TO SCHEDULES

COMES NOW, Sheldon Baruch Toibb and hereby files an amended Schedule A-3 to reflect four additional unsecured creditors and a Summary of Debts and Property. These creditors were already included on the matrix previously filed with the Court.

PEPER, MARTIN, JENSEN, MAICHEL
AND HETLAGE

By /s/ Audrey G. Fleissig
AUDREY FLEISSIG
720 Olive Street, 24th Floor
St. Louis, Missouri 63101
(314) 421-3850
Attorneys for
SHELDON BARUCH TOIBB

AMENDED

Schedule A-3—Creditors having unsecured claims without priority.

Name of creditor (including last known holder of any negotiable instrument) and complete mailing address including zip code.	Specify when claim was incurred and the consideration therefor; when claim is contingent, unliquidated, disputed, subject to setoff, evidenced by a judgment, negotiable instrument, or other writing, or incurred as partner or joint contractor, so indicate; specify name of any partner or joint contractor on any debt.	Indicate if claim is contingent, unliquidated, or disputed.	Amount of claim.
Stieferman Bros. Van & Storage 10899 Indian Head Industrial Blvd. St. Louis MO 63132	moving and storage charges incurred September 1986 and after.		\$ 1,958.35
Washington University Supervisor of Student Loans Lindell & Skinker Blvds. St. Louis MO 63130 Loan No. 76578	school loan incurred 1972		882.03
Washington University Supervisor of Student Loans Lindell & Skinker Blvds. St. Louis MO 63130 Loan No. 76578	school loan incurred 1972		3,084.01

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Yeshiva University 55 Fifth Ave. New York NY 10003 and American National Education Coop 33 North LaSalle St. Chicago IL 60678 Loan No. 30-0071-007142056-A	school loan incurred 1969		174.23
Total			6098.67

63

Summary of debts and property.
[From the statements of the debtor in Schedules A and B]

Schedule	DEBTS	\$	Total
A-1/a,b	Wages, etc. having priority	0	
A-1(c)	Deposits of money	0	
A-1/d(1)	Taxes owing United States	(disputed)	
A-1/d(2)	Taxes owing states	4,200.63	
A-1/d(3)	Taxes owing other taxing authorities	0	
A-2	Secured claims	0	
A-3	Unsecured claims without priority	unknown	
		137,619.34	
		Schedule A Total	141,819.97
			64
	PROPERTY		
B-1	Real property [total value]		
B-2/a	Cash on hand	0	
B-2/b	Deposits	20.00	
B-2/c	Household goods	0	
B-2/d	Books, pictures, and collections	100.00	
B-2/e	Wearing apparel and personal possessions	0	
B-2/f	Automobiles and other vehicles	250.00	
B-2/g	Boats, motors, and accessories	800.00	
B-2/h	Livestock and other animals	0	
B-2/i	Farming supplies and implements	0	
B-2/j	Office equipment and supplies	0	
B-2/k	Machinery, equipment, and supplies used in business	0	

B-2/l	Inventory	0	
B-2/m	Other tangible personal property	0	
B-2/n	Patents and other general intangibles	0	
B-2/o	Bonds and other instruments	0	
B-2/p	Other liquidated debts	0	
B-2/q	Contingent and unliquidated claims	unknown	
B-2/r	Interests in insurance policies	0	
B-2/s	Annuities	0	
B-2/t	Interests in corporations and unincorporated companies	unknown	
B-2/u	Interests in partnerships	0	
B-2/v	Equitable and future interests, rights, and powers in personality	0	
B-3/b	Property assigned for benefit of creditors	0	
B-3/a	Property not otherwise scheduled	0	
		Schedule B total	1,170.00
			65

Unsworn Declaration under Penalty of Perjury of Individual to Schedules A and B

I, Sheldon Toibb, declare under penalty of perjury that I have read the foregoing schedules, consisting of 12 sheets, and that they are true and correct to the best of my knowledge, information and belief.

Executed on February 1, 1988

Signature: Sheldon Toibb

We, and declare under penalty of perjury that we have read the foregoing schedules, consisting of sheets, and that they are true and correct to the best of our knowledge, information, and belief.

Executed on

Signature:

Signature:

List of Creditors Holding 20 Largest Unsecured Claims

Following is the list of the Debtor's creditors holding the 20 largest unsecured claims which is prepared in accordance with Rule 1007(d) for filing in this chapter 11 (or chapter 9) case. The list does not include (1) those persons who come within the definition of insider set forth in 11 U.S.C. § 101(25), (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims, or (3) governmental units.

Name of creditor and complete mailing address including zip code.	Name, telephone number and complete mailing address including zip code of employee, agent or department of creditor familiar with claim who may be contacted.	Nature of claim (trade debt, bank loan, type of judgment, etc.)	Indicate if claim is contingent, undated, disputed or subject to setoff.	Amount of claim (if secured) also state value of security.
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Beneficial National Bank, U.S.A. P.O. Box 1750 Wilmington DE 19899-1750	Mastercard and Visa credit card charges	12,170.40
Bank of America Bank Card Center P.O. Box 94116 Pasadena CA 91109	Visa credit card charges	8,082.01
Maryland Bank, N.A. P.O. Box 15020 Wilmington DE 19885-9971	Mastercard credit card charges	8,014.24
First American Bank of Washington 3700 Calvert St., N.W. Washington, D.C. 20007	Personal line of credit on checking account	7,392.96

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John J. McGrath, M.D. Suite 107 1616 18th St., N.W. Washington, D.C. 20009	medical services	7,125.00
Royal Bank Mid-County and Mercantile Bank & Trust Co. Credit Card Center P.O. Box 108 St. Louis MO 63166	Visa credit card charges	6,932.75
Choice P.O. Box 391 Baltimore MD 12103-0352	credit card charges	6,851.05
American Express Travel Related Services Co., Inc. 777 American Expressway Ft. Lauderdale FL 33337	credit card charges	6,465.02
First Virginia Bank P.O. Box 807A Falls Church VA 22046-1698	Visa credit card charges	6,379.04
Indiana National Bank c/o Card Services One Indiana Square Indianapolis IN 46266	Visa credit card charges	6,279.00 and 6,210.50
First American Bank of Virginia P.O. Box 1307 McLean VA 22101	Visa credit card charges	6,067.39

Name of creditor and complete mailing address including zip code.	Name, telephone number and complete mailing address including zip code of employee, agent or department of creditor familiar with claim who may be contacted.	Nature of claim (trade debt, bank loan, type of judgment, etc.).	Indicate if claim is contingent, unliquidated, disputed or subject to setoff.	Amount of claim (if secured) also state value of security.
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First Omni Bank
Bank Card Center
P. O. Box 800
Millsboro DE 19966

Visa and Mastercard credit and charges

4,248.89

Banc One
Department 0553
Columbus OH 43271

Visa credit card charges

4,004.35

Bohemian Savings & Loan Assn.
c/o Financial Card Center
P. O. Box 85201
Lincoln NE 68501

Visa credit card charges

3,139.92

Washington University
Supervisor of Student Loans
Lindell & Skinker Blvds.
St. Louis MO 63130

student loan

3,084.01

Sovran Bank

P. O. Box 11125

Richmond VA 23230

Visa credit card charges

2,768.46

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Sovran Bank

P. O. Box 11125

Richmond VA 23230

Mastercard credit card charges

2,752.67

Allied Bond & Collection Agency
4800 Street Rd.
Trevose PA 19047

Collection of Mastercard and Visa charges held by Beneficial Nt'l Bank. (Disputed)

2,676.98

Dickstein, Shapiro & Morin
Attorneys at Law
Suite 899
2101 "L" Street, N.W.
Washington, D.C. 20037

Legal fees

2,666.07

The Halladay Corporation
Suite 400
2121 Wisconsin Ave., N.W.

Washington, D.C. 20007

Back rent

2,417.73

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

PLAN OF REORGANIZATION

Dated: February 1, 1988

Sheldon Baruch Toibb (the "Debtor") proposes the following Plan of Reorganization pursuant to Section 1121(a) of the United States Bankruptcy Code, 11 U.S.C. Section 1121(a).

ARTICLE 1

DEFINITIONS

For purposes of this Plan of Reorganization, to the extent not otherwise provided herein, the following terms shall have the meanings herein set forth unless otherwise indicated, the singular shall include the plural and capitalized terms shall at all times refer to the terms as defined in this Article 1. A term used in the Plan that is not defined in this Plan but that is used in the Code shall have the meaning assigned to it in the Code.

1.1 *Administrative Claims*: Any cost, Claim or expense of administration of the Chapter 11 case, or the Chapter 7 case of which this Chapter 11 case was converted, allowed and entitled to priority in accordance with the provisions of Sections 503(b) and 507(a)(1) of the Code, including, without limitation, any actual and

necessary expenses of preserving the Debtor's estate, including, without limitation, all allowances of compensation or reimbursement of expenses to the extent allowed by the Court under Sections 330 or 503 of the Code, any fees or charges assessed against the Debtor's estate under Chapter 123 of title 28, United States Code.

1.2 *Allowed Claim*: Any Claim against the Debtor, provided: (a) proof of which was timely and properly filed or, if no proof of claim was filed, which has been or hereafter is listed by the Debtor on its schedules as liquidated in amount and not disputed or contingent and (b) in either such case, a Claim as to which no objection to the allowance thereof has been interposed on or before the Confirmation Date or such other applicable period of limitation fixed by the Code, the Rules or the Court, or as to which any objection has been determined by a Final Order to the extent such objection is determined in favor of a claimant. Unless otherwise specified herein or by order of the Court, "Allowed Claim" shall not include interest on such Claim for the period from and after the Petition Date.

1.3 *Allowed Unsecured Claim*: Any Allowed Claim which is not an Administrative Claim, Priority Claim or a Priority Tax Claim.

1.4 *Business Day*: Any day other than a Saturday, Sunday or a legal holiday as defined in Bankruptcy Rule 9006(a).

1.5 *Chapter 7 Trustee*. Stuart J. Radloff, who acted as the Chapter 7 trustee in the Chapter 7 case of which this Chapter 11 case was converted.

1.6 *Claim*: Any right to payment from the Debtor that arose on or before the Confirmation Date, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or any right to an equitable remedy for breach of per-

formance if such breach gives rise to a right of payment from the Debtor, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

1.7 *Code*: The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 11 U.S.C. Sections 101 *et seq.*, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, as in effect on April 1, 1986.

1.8 *Confirmation Date*: The date of entry of the Confirmation Order in accordance with the provisions of the Code; provided, however, that if the Confirmation Order is stayed on motion pending appeal, then the Confirmation Date shall be the date of entry of the Final Order vacating such stay.

1.9 *Confirmation Order*: The Order of the Court (or District Court as the case may be) confirming the Plan pursuant to Section 1129 of the Code and approving the transactions contemplated therein.

1.10 *Court*: The United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, including the United States Bankruptcy Judge presiding in this case or such other Court as may have jurisdiction over Chapter 11 cases.

1.11 *Creditor*: A person that is the holder of a Claim against the Debtor that arose on or before the Petition Date, or a Claim against the Debtor's estate of any kind specified in Section 502(g), (h) or (i) of the Code.

1.12 *Debtor*: Sheldon B. Toibb—an individual.

1.13 *Disclosure Statement*: That certain disclosure statement approved in this Chapter 11 case accompanying the Plan.

1.14 *Disputed Claim*: Any Claim as to which an objection to the allowance thereof has been interposed and

which objection has not been determined by a Final Order; provided, however, that (a) with respect to any Disputed Claim for which a proof of claim has not been filed with the Court in the amount of a sum certain and which has not been fixed by the Court at a sum certain (a "Contingent Claim"), the amount of such Contingent Claim shall for purposes of the Plan be fixed or liquidated by the Court under Section 502 of the Code or may be fixed by agreement in writing between the Debtor and the holder thereof; and (b) the amount of the Disputed Claim may be such lesser amount than the amount in which such Disputed Claim was filed as the Court may order or the Debtor and the holder of such Disputed Claim shall agree upon in writing; provided, further, that in no event shall any holder of a Disputed Claim, if and when such Disputed Claim becomes an Allowed Claim, be entitled to receive an amount greater than the amount reserved for such Disputed Claim.

1.15 *Effective Date*: The first Business Day occurring on or after the eleventh (11th) day after the Confirmation Date; provided, however, that if a stay of the Confirmation Order is in effect on such day, then the Effective Date shall be the first Business Day thereafter on which (a) no stay of the Confirmation Order is in effect and (b) the Confirmation Order has not been vacated.

1.16 *Final Order*: An order or judgment of the Court which (a) has not been reversed, stayed, modified or amended, and as to which the time to appeal or seek review or rehearing has expired and as to which any right to appeal, reargue, petition for certiorari or rehearing has been waived in a manner satisfactory to the Debtor, as a result of which such order shall have become final in accordance with applicable law or (b) if an appeal, reargument, petition for certiorari or rehearing has been sought, the order of the lower court has been affirmed by the higher court to which the order was

appealed or from which the reargument or rehearing was sought or certiorari has been denied and time to take further appeal or to seek certiorari or further reargument or rehearing has expired.

1.17 *IEC Stock*: The 400 shares of stock of Independence Electric Corporation owned by the Debtor.

1.18 *Petition Date*: October 2, 1987, the date the voluntary petition commencing the Chapter 7 case was converted to a case under Chapter 11.

1.19 *Plan*: This Plan of Reorganization proposed by the Debtor either in its present form or as it may be amended or modified from time to time.

1.20 *Priority Claims*: Claims entitled to priority under Sections 507(a)(2), (a)(3), (a)(4), (a)(5) and (a)(6) of the Code.

1.21 *Priority Tax Claims*: Claims entitled to priority under Section 507(a)(7) of the Code.

1.22 *Pro Rata*: The proportion that the amount of a Claim in a particular class bears to the aggregate amount of all Claims which are entitled to a particular distribution (including Disputed Claims until disallowed or allowed in whole or in part) in such class.

1.23 *Rules*: The rules of bankruptcy procedure recommended by the Judicial Conference of the United States, as prescribed by the Supreme Court of the United States, effective August 1, 1983 in accordance with the provisions of 28 U.S.C. Section 2075, as the same shall be amended from time to time.

The words "herein," "hereof" and "hereunder" and other words of similar import refer to the Plan as a whole and not to any particular section, subsection or clause contained in the Plan.

ARTICLE 2

CLASSIFICATION OF CLAIMS AND INTERESTS

2.1 Administrative Claims: As defined in paragraph 1.1 above.

2.2 Priority Claims: As defined in paragraph 1.20 above.

2.3 Priority Tax Claims: As defined in paragraph 1.21 above.

2.4 Class 1: Allowed Unsecured Claim.

ARTICLE 3

TREATMENT OF ADMINISTRATIVE CLAIMS

All Administrative Claims shall be paid in full, in cash, and in such amounts as are allowed by the Court (a) on the later of 10 days after the entry of a Final Order of the Court allowing such Administrative Claim or 10 days after the Effective Date or (b) upon such other terms and conditions as may be agreed upon between the holder of an Administrative Claim and the Debtor.

ARTICLE 4

TREATMENT OF PRIORITY CLAIMS

All Priority Claims shall be paid in full, in cash, and in such amounts as are allowed by the Court (a) on the later of 10 days after the entry of a Final Order of the Court allowing such Priority Claim or 10 days after the Effective Date or (b) upon such other terms and conditions as may be agreed upon between the holder of a Priority Claim and the Debtor.

ARTICLE 5

TREATMENT OF PRIORITY TAX CLAIMS

All Priority Tax Claims shall be paid in full in cash, 10 days after the Effective Date if the parties agree upon

the amount of such claim by such time, or if such agreement cannot be reached, 10 days after the entry of a Final Order of the Court determining the amount of such claim.

ARTICLE 6

TREATMENT OF CLASS 1 CLAIMS

The Debtor shall pay to the Class 1 Creditors the amount of \$25,000, less Administrative Claims, Priority Claims and Priority Tax Claims. In addition, the Class 1 Creditors shall be granted a right, for a period of six (6) years, to receive on a Pro Rata basis, fifty percent (50%) of any dividends (or other forms of distributions) received on the IEC Stock, up to full payment of the principle amount of the claim. The Debtor shall retain the right to receive the other 50% of dividends on the IEC Stock. In addition, if during the six (6) year period beginning on the Confirmation Date the Debtor sells any or all of the IEC Stock, 50% of the proceeds from such sale shall be distributed on a Pro Rata basis to the Class 1 Creditors.

ARTICLE 7

ADDITIONAL PROVISIONS FOR TREATMENT OF IMPAIRED CLASSES

(CLASS 1)

All impaired classes of Claims shall receive the treatment set forth in the Plan on account of and in complete satisfaction of all such Allowed Claims. Without limiting the foregoing and upon the Effective Date, each holder of a Claim by virtue of (i) the acceptance of the Plan by the requisite number and amount of members of its Class, (ii) the acceptance of the Plan by such Creditor, (iii) the acceptance by such Creditor of any payment made or consideration given under the Plan, or (iv) the confirmation of the Plan, shall be deemed to have assigned to the Debtor and all such parties shall be deemed to have waived, relinquished and released any and all of their

rights and Claims (other than as provided for in the Plan or the Confirmation Order) against the Debtor (to the extent provided for in the Plan).

ARTICLE 8

MEANS FOR EXECUTION OF THE PLAN

8.1 *Funds for Payment*: It is anticipated that the only Administrative Claims will be that of the Debtor's legal counsel for fees and expenses, including the filing fee, (estimated at \$7,600.00, of which \$4,000 has been deposited pursuant to a retainer approved by the Court) and of the Chapter 7 Trustee (\$500.00) and his counsel (\$1,696.25). It is not anticipated that there will be any Priority Claims and the only Priority Tax Claim is of the Internal Revenue Service (\$4,200.63) which the Debtor has listed as disputed. In order to pay the Administrative Claims, Priority Claims, and Priority Tax Claims and to fund the initial payments to the Class 1 Creditors, the Debtor will borrow \$25,000 from an independent third party at such interest rate and maturing at such time as the parties thereto may agree.

8.2 *Unclaimed Distributions*: Any distribution to which a Creditor is entitled and which such Creditor has not claimed on or before six months following the later of (a) six months following the Effective Date or (b) six months subsequent to the date upon which such Creditor's Claim becomes an Allowed Claim, and all interest earned thereon, shall be promptly delivered to the Debtor to be held in a special account subject to the Final Distribution provisions set forth below. At the end of said period set for Final Distribution, the holders of Allowed Claims theretofore entitled to distributions which were unclaimed shall cease to be entitled thereto, and the Debtor shall distribute the unclaimed distributions plus earned interest thereon Pro Rata to Class 1 Creditors.

8.3 *Final Distribution*: On the later of (a) the date on which all Claims in each class of Allowed Claims are

resolved and (b) six years following the Effective Date, as the case may be, the Debtor shall make a final recalculation of the distributions to the holders of Allowed Claims in each Class, taking into account the resolution of disputed contested claims (the interest earned on any reserved amount for contested claims shall inure to the benefit of the Debtor) and distributions previously made and permitted under the Plan. Upon completion of such final recalculations for each Class of Allowed Claims, there shall be released from the respective funds to the holders of Allowed Claims in such Class all reserved funds not previously used to pay contested claims. Any property not otherwise distributed pursuant to the foregoing shall become the sole and exclusive property of the Debtor.

ARTICLE 9

REJECTION OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

All executory contracts and unexpired leases of the Debtor entered into prior to the Petition Date, and which are neither assumed pursuant to Section 365 of the Code prior to the Confirmation Date, nor assumed under the Plan, shall be deemed rejected upon the Confirmation Date. Each non-Debtor party to an executory contract or an unexpired lease rejected hereunder, or pursuant to prior order of the Court, shall have thirty (30) days subsequent to the Confirmation Date to file a proof of claim with the Court asserting damages arising from such rejection, and the Debtor reserves the right to file an objection to any such claim.

ARTICLE 10

DISCHARGE

Except as otherwise provided in the Plan or the Confirmation Order, pursuant to Section 1141(d)(1) of the Code, entry of the Confirmation Order acts as a discharge,

effective as of the Effective Date, of any and all debts of the Debtor that arose at any time before the entry of the Confirmation Order, including, but not limited to, all principal and any interest accrued thereon. The discharge of the Debtor shall be effective as to each Claim, regardless of whether a proof of claim therefore was filed, whether the claim is an Allowed Claim, or whether the holder thereof votes to accept the Plan.

ARTICLE 11

RETENTION AND ENFORCEMENT OF CLAIMS

Pursuant to Section 112(b)(3) of the Code, the Debtor shall retain and may enforce any and all Claims of the Debtor.

ARTICLE 12

MODIFICATION OF THE PLAN

12.1 Modifications of the Plan may be proposed in writing by the Debtor at any time before confirmation, provided that such Plan, as modified, meets the requirements of Sections 1122 and 1123 of the Code, and the Debtor shall have complied with Section 1125 of the Code.

12.2 The Plan may be modified at any time after confirmation and before its substantial consummation, provided that such Plan, as modified, meets the requirements of Sections 1122 and 1123 of the Code, and the Court, after notice and a hearing, confirms such Plan, as modified, under section 1129 of the Code, and the circumstances warrant such modification.

12.3 A holder of a claim that has accepted or rejected the Plan shall be deemed to have accepted or rejected, as the case may be, such Plan as modified, unless, within the time specified by the Court, such holder changes its previous acceptance or rejection.

ARTICLE 13

GENERAL PROVISIONS

13.1 *Extension of Payment Dates.* If any installment payment under the Plan falls due on a Saturday, Sunday or other day which is not a Business Day, then such due date shall be extended to the next following Business Day.

13.2 *Notices.* Any notice hereunder to the Debtor shall be in writing, and if by telegram or telex, shall be deemed to have been given when sent, and if by mail, shall be deemed to have been given three (3) days after the date when sent by registered or certified mail, postage prepaid, and addressed to the Debtor as follows:

Sheldon B. Toibb
8640 Olive Street Rd.
St. Louis, MO 63132

and a copy to:

Peper, Martin, Jensen, Maichel and Hetlage
720 Olive Street—Twenty-Fourth Floor
St. Louis, Missouri 63101
Attention: Audrey G. Fleissig

13.3 *Captions:* Section captions used in the Plan are for convenience only and shall not affect the construction of the Plan.

13.4 *Severability:* Should any provision in the Plan be determined to be unenforceable, such determination shall in no way limit or affect the enforceability and operative effect of any other provision of the Plan.

13.5 *Successors and Assigns:* The rights and obligations of any person named or referred to in the Plan shall be binding upon, and shall inure to the benefit of the successors or assigns of such person.

ARTICLE 14

PROCEDURES FOR RESOLVING
CONTESTED CLAIMS

14.1 Objections to Claims shall be filed with the Court and served upon each holder of each of the Claims to which objections are made not later than 120 days subsequent to the Confirmation Date.

14.2 Payments and distributions to each holder of a contested claim that ultimately becomes an Allowed Claim shall be made in accordance with the provisions of the Plan with respect to the Class of Creditors to which the respective holder of an Allowed Claim belongs. Interest on any funds reserved for a contested claim shall inure to the benefit of the Debtor. Such payments and distributions shall be made as soon as practicable after the date that the order or judgment allowing such Claim is a Final Order.

ARTICLE 15

RETENTION OF JURISDICTION

Notwithstanding confirmation of this Plan, the Court shall retain jurisdiction for the following purposes:

(a) Determination of the allowability of Claims and interests upon objection to such Claims by the Debtor or by any other party in interest;

(b) Determination of requests for payment to professional persons and Claims entitled to priority under Sections 503 and 507 of the Code, including compensation of parties entitled thereto;

(c) Implementation of the provisions of the Plan and entry of orders in aid of confirmation of the Plan, including, without limitation, appropriate orders to protect the Debtor and its successors from Creditor action;

(d) Modification of the Plan pursuant to Section 1127 of the Bankruptcy Code;

(e) Adjudication of any causes of action, including avoiding power actions brought by the Debtor;

(f) Determination of any issues raised by papers filed with the Court on or before the Confirmation Date; and

(g) Entry of a final decree closing the Debtor's case.

By /s/ Sheldon Baruch Toibb
SHELDON BARUCH TOIBB

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

BALLOT FOR ACCEPTING OR REJECTING PLAN

Filed by _____ on _____.

The plan referred to in this ballot can be confirmed by the court and thereby made binding on you if it is accepted by the holders of two-thirds in amount and more than one-half in number of claims in each class voting on the plan. In the event the requisite acceptances are not obtained, the court may nevertheless confirm the plan if the court finds that the plan accords fair and equitable treatment to the class rejecting it. To have your vote count you must complete and return this ballot.

The undersigned, a creditor of the above-named Debtor in the unpaid principal amount of \$_____.

[Check One] _____ Accepts

_____ Rejects

the plan for the reorganization of the above-named Debtor.

Print or type name: _____

Signed: _____

Return this ballot on or before _____, 1988.

To:

Name: _____

Address: _____

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

DISCLOSURE STATEMENT

Dated: February 1, 1988

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB, 494-50-3162,
Debtor.

DISCLOSURE STATEMENT

I. INTRODUCTION

A. *Purpose of Disclosure Statement*

Sheldon Baruch Toibb (the "Debtor") is providing this Disclosure Statement ("Disclosure Statement") to all known Creditors, pursuant to Section 125 of the Bankruptcy Reform Act of 1978 (Pub. L. 95-598), 11 U.S.C. § 101 *et seq.*, as amended ("Bankruptcy Code"), in order to permit each Creditor of the Debtor to make an informed judgment in exercising their right to vote on the Plan of Reorganization of the Debtor dated February 2, 1988 (the "Plan") described below. A copy of the Plan is attached hereto.

B. *Source of Information*

Except as otherwise expressly indicated, all information contained in this Disclosure Statement has been furnished by the Debtor.

C. *Filing of Bankruptcy Petition*

On November 18, 1986, the Debtor filed a voluntary petition for liquidation under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division

("Bankruptcy Court") as Case No. 86-02881-BSS. Stuart J. Radloff was appointed as Chapter 7 Trustee (the "Chapter 7 Trustee"). On October 2, 1987, an order was entered by the Bankruptcy Court converting this case to a case under Chapter 11 of the Bankruptcy Code and granting relief under said chapter.

As of the date of this Disclosure Statement, the Bankruptcy Court has not appointed a committee of unsecured creditors. Given the relatively small number of Creditors of the Debtor, it is not anticipated that the Bankruptcy Court will appoint a committee of unsecured creditors.

D. *Manner of Voting on Plan*

All Creditors entitled to vote on the Plan may cast their votes for or against the Plan by completing, dating and signing the ballot for accepting or rejecting the Plan ("Ballot") accompanying this Disclosure Statement and filing it with the Bankruptcy Court. Such filings may be accomplished personally or by mailing Ballots to the Clerk of the Bankruptcy Court at 1114 Market Street, St. Louis, Missouri 63101-2043. In order to be counted, all Ballots must be filed or received by the Bankruptcy Court on or before _____, 1988.

E. *Confirmation of Plan*

1. *Solicitation of Acceptances*

This Disclosure Statement has been approved by the Bankruptcy Court in accordance with Section 1125 of the Bankruptcy Code and Bankruptcy Rule 3006 and is provided to each Creditor of the Debtor whose claim or interest has been scheduled by the Debtor or who has filed a proof of claim against the Debtor. This Disclosure Statement is intended to assist Creditors whose claims are impaired in evaluating the Plan and in determining whether to accept or reject the Plan. Under the Bankruptcy Code, acceptance or rejection of the Plan may not

be solicited unless a copy of this Disclosure Statement is furnished prior to or concurrently with such solicitation.

THE BANKRUPTCY COURT'S APPROVAL OF THIS DISCLOSURE STATEMENT DOES NOT CONSTITUTE A RECOMMENDATION BY THE BANKRUPTCY COURT EITHER "FOR" OR "AGAINST" THE PLAN.

THIS DISCLOSURE STATEMENT HAS NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED ON THE ACCURACY OR ADEQUACY OF THE STATEMENTS CONTAINED HEREIN.

NO REPRESENTATIONS CONCERNING THE DEBTOR ARE AUTHORIZED OTHER THAN AS SET FORTH IN THIS DISCLOSURE STATEMENT OR AS OTHERWISE AUTHORIZED BY THE BANKRUPTCY COURT. ANY REPRESENTATION OR INDUCEMENT MADE TO SECURE YOUR ACCEPTANCE OF THE PLAN WHICH IS OTHER THAN AS CONTAINED IN THIS DISCLOSURE STATEMENT OR AS AUTHORIZED BY THE BANKRUPTCY COURT SHOULD NOT BE RELIED ON BY YOU IN ARRIVING AT YOUR DECISION, AND ANY SUCH ADDITIONAL REPRESENTATION OR INDUCEMENT SHOULD BE REPORTED TO THE BANKRUPTCY COURT.

2. *Persons Entitled to Vote on Plan*

Only those classes of claims which are impaired by the Plan are entitled to vote on the Plan. Generally, and subject to the specific provisions of Section 1124 of the Bankruptcy Code, an impaired class includes a class of claims which, under the Plan, will receive less than payment in full in cash of the allowed amounts of their respective claims on the "Effective Date" (The Plan de-

finer "Effective Date" as: "the first business day occurring on or after the eleventh (11th) day after the Confirmation Date; provided, however, that if a stay of the Confirmation Order is in effect on such first business day, then the Effective Date shall be the first business day thereafter on which (a) no stay of the Confirmation Order is in effect and (b) the Confirmation Order has not been vacated"); has its legal, equitable or contractual rights altered by the Plan; or will not receive payment on account thereof in accordance with expected commercial practice. The classes which are not impaired by the Plan are Administrative Claims, Priority Claims and Priority Tax Claims. All other classes of claims are impaired by the Plan. (See "Plan of Reorganization—Classes of Claims" and "Plan of Reorganization—Treatment of Claims Impaired by the Plan").

In determining acceptance of the Plan, votes will be counted only if submitted by a Creditor whose claim is scheduled by the Debtor as undisputed, non-contingent and liquidated, or who timely filed with the Bankruptcy Court a proof of claim which has not been disallowed, disqualified or suspended prior to computation of the vote on the Plan. The Ballot which accompanies this Disclosure Statement does not constitute a proof of claim. If you are uncertain whether your claim has been correctly scheduled, you should check the Debtor's schedules which are on file with, and may be inspected at, the Bankruptcy Court. THE BANKRUPTCY COURT HAS SET FEBRUARY 16, 1988 AS A BAR DATE FOR FILING A PROOF OF CLAIM. DISPUTED CLAIMS NOT FILED BY THE BAR DATE GENERALLY ARE NOT ALLOWED.

3. *Hearing on Confirmation of Plan*

The Bankruptcy Court has set _____, 1988 at _____ as the time for the hearing to determine whether the Plan has been accepted by the requisite number of

Creditors and whether the other requirements for confirmation of the Plan have been satisfied. Objections to Confirmation of the Plan must be in writing and filed on or before _____, 1988 with the Clerk of the Bankruptcy Court at 1114 Market Street, St. Louis, Missouri 63101-2043, and served on Counsel for the Debtor, Peper, Martin, Jensen, Maichel and Hetlage, Twenty-Fourth Floor, 720 Olive Street, St. Louis, Missouri 63101, Attention: Audrey G. Fleissig. The hearing may be continued from time to time without further notice to you other than the announcement in open court of the continued date.

4. *Acceptances Necessary to Confirm Plan*

At the confirmation hearing, the Bankruptcy Court must determine, among other things, whether the Plan has been accepted by each class (a "Class") of claims whose claims are impaired by the Plan. Under Section 1126 of the Bankruptcy Code, an impaired Class is deemed to have accepted the Plan if (a) at least two-thirds in dollar amount and (b) more than one-half in number of those claims which have actually voted on the Plan have voted to accept the Plan. Further, unless there is unanimous acceptance of the Plan by an impaired Class, the Bankruptcy Court must also determine that under the Plan each claimant of that Class will receive property of a value, as of the Effective Date of the Plan, that is not less than the amount that such claimant would receive or retain if the Debtor's property were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date of the Plan. If the Debtor's property were liquidated under Chapter 7 of the Bankruptcy Code, the Debtor believes general unsecured creditors would receive nominal payments on account of their claims. By comparison, the Plan offers general unsecured creditors distributions equal to the amount the general unsecured creditors would receive under a Chapter 7 liquidation, plus the opportunity to receive addi-

tional sums over a six year period. (See "Plan and Reorganization—Funding of Plan").

5. *Confirmation of Plan Without Necessary Acceptances*

The Plan may be confirmed even if it is not accepted by all of the impaired Classes if the Bankruptcy Court finds that the Plan was accepted by at least one impaired Class and complies with the requirements of Section 1129 (a), other than paragraph 8, of the Bankruptcy Code, and does not discriminate unfairly against, and is fair and equitable as to, all non-accepting impaired Classes. This provision is set forth in Section 129(b) of the Bankruptcy Code. In seeking confirmation of the Plan, the Debtor intends to rely, if necessary, on Section 1129(b) of the Bankruptcy Code as to any non-accepting Classes.

II. PLAN OF REORGANIZATION

The following is a brief summary of certain of the more significant provisions of the Plan. Capitalized terms used but not defined in this Disclosure Statement have the meanings ascribed to them in the Plan. THIS SUMMARY IS QUALIFIED IN ITS ENTIRETY BY THE FULL TEXT OF THE PLAN ATTACHED HERETO, WHICH ALL CREDITORS ARE URGED TO REVIEW CAREFULLY.

A. *Classes of Claims*

In addition to Administrative Claims, Priority Claims and Priority Tax Claims, the Plan provides claims into one (1) separate class listed below.

Class 1: Allowed unsecured claims.

Administrative Claims: Costs or expenses of administration of the Debtor's reorganization which may be allowed and entitled to priority pursuant to Section 503

(b) and 507(a)(1) of the Bankruptcy Code, including any actual and necessary expenses of preserving the Debtor's estate, and all allowances, including professional fees and costs, that may be approved by the Bankruptcy Court in accordance with the Bankruptcy Code. It is anticipated that the only Administrative Claims will be those of the Debtor's legal counsel for fees and expenses, including the filing fee (estimated at \$7,600.00, of which \$4,000 has been deposited pursuant to a retainer approved by the Court), the Chapter 7 Trustee (\$500.00), and (iii) the attorney for the Chapter 7 Trustee (\$1,696.25).

Priority Claims: Claims entitled to priority under Section 507(a)(2), (a)(3), (a)(4), (a)(5) and (a)(6) of the Bankruptcy Code. The Debtor did not schedule any claims under these sections of the Bankruptcy Code and does not believe any such claims will be filed. However, in the event one or more proofs of claim are filed asserting such priority status, and if any such claim is ultimately allowed by the Bankruptcy Court as a priority claim under any of the foregoing sections of the Bankruptcy Code, the Debtor will pay in full such priority claims in cash.

Priority Tax Claims: Claims entitled to priority under Section 507(a)(7) of the Bankruptcy Code. The Debtor has listed as disputed the claim of the Internal Revenue Service in the amount of \$4,200.63. The amount of the claim of the Internal Revenue Service shall be as established by the Bankruptcy Court or as may be agreed upon by the parties.

*B. Treatment of Claims Not Impaired by the Plan
(Administrative Claims, Priority Claims, and
Priority Tax Claims)*

Each Administrative Claim, Priority Claim and Priority Tax Claim will be paid in cash in full within 10 days of the entry of an order of the Bankruptcy Court allow-

ing such Administrative Claim or Priority Claim or Priority Tax Claim or within 10 days of the Effective Date, whichever is later, or upon such other terms and conditions as may be agreed upon between the holder of such Administrative Claim or Priority Claim or Priority Tax Claim and the Debtor.

C. Treatment of Claims Impaired by the Plan

Class 1: Within 10 days of the Effective Date, the Debtor will pay to the Class 1 Creditors on a Pro Rata basis an amount equal to \$25,000 less than the amounts of the Administrative Claims, Priority Claims and Priority Tax Claims. The Debtor estimates that after payment of Administrative Claims, Priority Claims and Priority Tax Claims \$15,000 will be available for Class 1 creditors. Based upon the schedules of the Debtor which lists \$137,619 of unsecured claims, each Class 1 creditor will receive approximately 11% of its allowed unsecured claim. In addition, for a period of six (6) years beginning on the Effective Date the Debtor will pay to the Class 1 creditors of the principal amount of the claim 50% of all amounts received as dividends that the Debtor receives on his 400 shares of stock of Independence Electric Corporation ("IEC Stock") and will pay to the Class 1 creditors on a Pro Rata basis 50% of any proceeds realized by the Debtor upon the sale of any or all of the shares of IEC Stock during such six (6) year period. (See "Description of Independence Electric Corporation.")

*D. Additional Provisions for Treatment of Impaired
Classes*

All impaired classes of claims shall receive the treatment set forth in the Plan on account of and in complete satisfaction of all such allowed claims. Without limiting the foregoing and upon the Effective Date, each holder of a claim by virtue of (i) the acceptance of the Plan by

the requisite number and amount of members of its Class, (ii) the acceptance of the Plan by such Creditor, (iii) the acceptance by such Creditor of any payment made or consideration given under the Plan, or (iv) the confirmation of the Plan, shall be deemed to have waived, relinquished and released any and all of their rights and claims (other than as provided for in the Plan or the Confirmation Order) against the Debtor (to the extent provided for in the Plan).

E. *Funding of Plan*

The Debtor has obtained a commitment for a loan of \$25,000.00 which will be used to fund the Plan of Reorganization. The \$25,000.00 loan will be unsecured and shall bear such interest rate and mature at such time as the parties thereto may agree. The loan will be repaid from the Debtor's personal income that is earned subsequent to the Confirmation Date, including Debtor's 50% of any dividends on the IEC Stock.

The Debtor will agree not to encumber the IEC Stock nor dispose of any shares of IEC Stock except to a bona fide purchaser at an arm's length transaction. The Debtor, however, is not granting an interest in the IEC Stock to the creditors but is merely promising to pay the creditors a portion of cash payments he may receive relating to the IEC Stock. As of the date hereof, there has never been any dividends declared on the IEC Stock and the Debtor cannot state with any certainty whether or not any dividends will be declared in the next 6 years. Furthermore, since only two other individuals own stock in Independence Electric Corporation ("IEC"), the Debtor cannot state with any certainty whether or not there will be a market for his 400 shares of IEC Stock if he subsequently determines to sell any or all of such shares. (See "Description of Independence Electric Corporation.")

F. *Income Tax Consequences of the Plan*

THE TAX CONSEQUENCES OF CONFIRMATION OF THE PLAN MAY VARY BASED ON THE INDIVIDUAL CIRCUMSTANCES OF PERSONS RECEIVING DISTRIBUTIONS OR PROPERTY UNDER THE PLAN. NO RULING HAS BEEN REQUESTED OR OBTAINED FROM THE INTERNAL REVENUE SERVICE CONCERNING THE TAX ASPECTS OF THE PLAN. EACH HOLDER OF A CLAIM IS URGED TO CONSULT WITH HIS, HER OR ITS OWN TAX ADVISORS TO ASCERTAIN THE ACTUAL TAX CONSEQUENCES TO SUCH HOLDER UNDER FEDERAL AND APPLICABLE STATE LAWS OF CONFIRMATION AND CONSUMMATION OF THE PLAN.

THE FOREGOING IS A SUMMARY OF THE PLAN AND SHOULD NOT BE RELIED ON FOR VOTING PURPOSES. CREDITORS ARE URGED TO READ THE PLAN IN FULL. CREDITORS ARE FURTHER URGED TO CONSULT WITH COUNSEL OR WITH EACH OTHER IN ORDER TO FULLY UNDERSTAND THE PLAN. THE PLAN IS COMPLEX INASMUCH AS IT REPRESENTS A PROPOSED LEGALLY BINDING AGREEMENT, AND INTELLIGENT JUDGMENT CONCERNING THE PLAN CANNOT BE MADE WITHOUT UNDERSTANDING IT.

III. DESCRIPTION OF THE DEBTOR

The Debtor is a self-employed individual who has an energy consulting practice which includes strategic planning in the marketing and economic generation of electricity, advice, and the formulation of positions Rabbinical College Building Fund. It is not anticipated that either of these activities of the Debtor will generate income in excess of what the Debtor needs for normal living expenses and therefore, none of such income is being used to fund the Plan of Reorganization.

IV. DESCRIPTION OF INDEPENDENCE ELECTRIC CORPORATION

The Debtor owns 400 shares of IEC Stock which represents 24% of the outstanding stock. There are two other shareholders who own the remaining 76% of the outstanding stock. IEC is a Delaware corporation incorporated in 1983 with its principal place of business in Washington, D.C. IEC was organized to develop and operate low-head hydroelectric power stations as an independent small power producer under provision of the Public Utility Regulatory Policies Act.

Effective August 1, 1987, IEC received from the Federal Energy Regulatory Commission ("FERC") an exclusive license to construct and operate for 40 years a hydroelectric power project on the Pearl River in the State of Mississippi. The estimated size of the project is 9.5 megawatts.

A condition of the original license requires that construction begin by August 1, 1989, and must be completed by August 1, 1991. IEC has received a two year extension from the FERC to begin construction, and therefore must begin construction by August 1, 1991, and be finished by August 1, 1993. IEC's consulting engineering firm estimates that it would take two years to construct the power plant. The latest available construction cost estimate for the plant is \$20,000,000.00.

Effective December 1, 1987, IEC received from FERC an exclusive license to construct and operate three hydroelectric projects in Alabama. The three sites are estimated to be 24 megawatts, 20 megawatts and 6 megawatts in size. A condition in each of the three licenses requires that construction begin no later than December 1, 1989, and be completed by December 1, 1991. No extension of time has been applied for any of these three sites. IEC's consulting engineering firm estimates it would take two years to construct each of these three licensed sites.

The latest estimated construction cost for the larger two sites is \$40,000,000.00 each, and \$20,000,000.00 for the smallest site.

IEC has a license application pending for another site in Alabama, which is estimated to be 26 megawatts in size and to have a construction cost of \$47,500,000.00. IEC is one of two competing applicants for this license. It is anticipated that FERC may issue the license in approximately June of 1988.

IEC has spent approximately \$1,100,000.00 in developing its license applications. In a letter dated April 20, 1987, Michael Cardozo, who represented himself to be acting on behalf of the corporation, advised the former Trustee that as of the end of March, 1987, IEC had \$4,210.00 in cash, unpaid liabilities to suppliers of approximately \$268,810.00, and also stated it had loans due a shareholder (not the Debtor) of \$372,000.00. The Debtor has no information that indicates the asserted liabilities have been paid. IEC's consulting engineering firm has notified it that the FERC is requiring \$75,000.00 of postlicensing studies to be done with respect to the Pearl River dam site, and \$5,000.00 of work on each of the three licensed Alabama sites. All of this work must be completed by June 1, 1988. The consulting engineering company is requiring that IEC, or its individual shareholders, prepay in full the \$90,000.00 in order for it to complete the work.

IEC's future is uncertain. The Debtor does not know whether or not the funds needed for the engineering work, the preconstruction tasks or for the large amounts of construction capital needed for each site will be forthcoming or in what form if such capital is available.

V. *Financial Information Concerning the Debtor*

During the four month period beginning October, 1987 and ending January 31, 1988, the Debtor earned approximately \$2,200.00 from his fundraising operation. How-

ever, this amount was not sufficient to cover total expenses, and the Debtor received additional support from family members. As of the date hereof, all expenses incurred after the case was converted to Chapter 11 have been or are being paid on a current basis.

The only assets of the Debtor are personal belongings and 400 shares of IEC Stock. Prior to the conversion of this case from Chapter 7 to Chapter 11, the Chapter 7 Trustee attempted to sell the IEC Stock. On August 6, 1987, the Chapter 7 Trustee filed a notice of a proposed sale for the 400 shares of IEC Stock for \$25,000.

VI. *Analysis of Liquidation*

In a liquidation proceeding all of the Debtor's personal belongings would be exempt property not subject to distribution to the Debtor's creditors. The only asset available to the Debtor's creditors upon liquidation would be the 400 shares of IEC Stock. Except for the offer received by the Trustee, the Debtor is unaware of any current market for the shares. After negotiations with the other two shareholders of IEC, the Chapter 7 Trustee proposed to sell the IEC Stock to them for \$25,000. If said sale had been consummated, the unsecured creditors of the Debtor would receive an amount, in the aggregate, equal to \$25,000 less costs of administration (the fees and expenses of the Chapter 7 Trustee and his attorney and the claim of the Internal Revenue Service a priority claim in the event of liquidate).

The Plan of Reorganization proposed by the Debtor proposes to pay to the Debtor's creditors the \$25,000 the Chapter 7 Trustee would have received for the sale of the IEC Stock (less costs of administration and Priority Tax Claims), and, in addition, provides that the Debtor's creditors will receive 50% of any payments Debtor may receive as dividends on the IEC Stock for a period of six (6) years beginning on the Effective Date and 50% of any proceeds realized by the Debtor if any or all of the

IEC Stock is sold by the Debtor within 6 years of the Effective Date. Therefore, the Plan of Reorganization proposes a payout to creditors of an amount at least equal to what the creditors would receive in a liquidation with the possibility of a greater return if the IEC Stock earns a dividend or if the Debtor sells the IEC Stock within the next 6 years.

Dated: February 1, 1988.

/s/ Sheldon Baruch Toibb
SHELDON BARUCH TOIBB

Attorney at Law

Member New York & U.S. Supreme Court Bars

Real Estate Investments

SIDNEY J. BROWN
University Plaza Office Bldg.
1835 University Boulevard
Hyattsville, Maryland 20783
(301) 422-3300

March 2, 1988

VIA PUROLATOR

Honorable Barry S. Schermer
United States Bankruptcy Judge
730 U.S. Courthouse
St. Louis, MO 63101

Re: Sheldon Toibb
Case No. 86-02-881-BSS
U.S. Bankruptcy Court for
the Eastern District of
Missouri

Dear Judge Schermer:

When Mr. Toibb filed a petition in bankruptcy which was a Chapter 7 proceeding, he advised the court that 400 shares of stock he owned in Independence Electric Corporation ("IEC") were of unknown value. At that time (and still true) the company debts were so great and the opportunity for obtaining capital was so remote that his statement was an accurate one.

However, since Mr. Toibb, while involved with the company as an employee created dissention, disagreement and an unhealthy atmosphere, if I and my fellow shareholders were to be able to realize anything from our \$1,000,000+ investment and loans to the company, it was

necessary to avoid any further differences, disputes and contentiousness, and IEC was willing to pay what it considered a nuisance value sum of \$25,000 to clear the air.

Thereafter Mr. Toibb, still wanting to hold on to the stock despite his indebtedness and his bankruptcy, filed a Chapter 11 proceeding and is now trying to involve his creditors in IEC's affairs by offering to pay them out of dividends to be received from IEC or from the sale of his stock.

However, Mr. Toibb properly sets forth the obvious valueness of his stock. Although, on the one hand he suggests dividends and the possible sale of the stock as a possible source of funds to pay creditors, he also, in the same breath accurately sets forth the Corporation's current indebtedness of \$268,810 and the need for millions upon millions of dollars in order to create something out of the licenses.

He fails to mention that the licenses are in great jeopardy of being lost because there is no capital available in the area of millions of dollars just to process the necessary legal, engineering and other procedures required to keep them alive.

At I stated, Sheldon Tobbi's interjection of himself into the affairs of IEC when there was a need for him to allow the company to do what was necessary to develop the company, is now being embellished by trying to involve creditors by giving them an interest that can further impair any prospect for obtaining additional capital.

In an effort to try and salvage something from our large investment here, (as you well know Mr. Toibb made no cash investment and as a matter of fact received approximately \$100,000 in compensation while he was associated with the company) and to try and meet IEC's creditor obligations, the Company needs to be free of conflicting demands so that it can act expeditiously

and responsibly in trying to avoid its own bankruptcy or other economic disaster.

Accordingly, I who have invested in the Corporation and loaned to it funds totaling in excess of \$1,000,000 hereby personally offer to buy the 400 shares of IEC stock held by Mr. Toibb for \$50,000. I am making this offer in order to rid the Corporation of this nuisance and to allow IEC to try and liquidate what it can, pay off its debts and maybe try to obtain a return of some of my capital.

Please accept this letter as an unconditional offer to buy Mr. Toibb's 400 shares of IEC stock for \$50,000 and the release of any or all claims which Mr. Toibb may have against IEC, its shareholders, directors, officers, employees and agents. This offer shall be good for a period of 30 days from your receipt of this letter.

I am addressing this letter to the Court, with copies to Mr. Toibb and his attorney. I am assuming that this is an appropriate method of making this offer.

Very truly yours,

/s/ Sidney J. Brown
SIDNEY J. BROWN

SJB:pal

cc: Mr. Sheldon Toibb
Audrey G. Fleissig, Esq.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB,
Debtor.

TRANSCRIPT ON APPEAL

March 7, 1988

APPEARANCES

Peper, Martin, Jensen, Maichel & Hetlage, 720 Olive Street, 24th Floor, St. Louis, Missouri 63101, by Audrey Fleissig, Esq., appearing on behalf of debtor.

Stuart J. Radloff, Esq., 7777 Bonhomme, Clayton, Missouri 63105, appearing in his capacity as former trustee of the bankruptcy estate.

[2]

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March 7, 1988

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[3] The following cause came on for hearing before the Honorable Barry S. Schermer, Judge of the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division, at St. Louis, on the 7th day of March, 1988.

The Debtor, Sheldon Baruch Toibb, was present in person and by attorney Audrey Fleissig.

The Trustee, Stuart Radloff, was present in person.

[4] PROCEEDINGS

THE COURT: In the matter of Sheldon Toibb, may I have all parties of interest? Good morning.

MS. FLEISSIG: Good morning.

THE COURT: Did you receive any response to your disclosure statement?

MS. FLEISSIG: Your Honor, we have only received two documents which I believe the Court has also received. One was a personal letter from a Sidney Brown—

THE COURT: Umm hmm.

MS. FLESSIG: —directed personally to your attention. The other was a letter from his attorney, Mr. Cardozo, which was hand delivered to us Friday at about 5:30. And—

THE COURT: I've received one of the two.

MS. FLESSIG: I'd be happy to show you a copy of the other, your Honor.

THE COURT: Thank you, ma'am.

MS. FLESSIG: Especially since the other purports to raise some objections to the disclosure statement itself.

THE COURT: All right.

MS. FLESSIG: Your Honor, perhaps while I'm pulling this out for you, I would like to [5] bring one thing to your attention in case you yourself did not recall. For a brief period after Mr. Toibb worked for the Car-

ter campaign, probably early in 1977, he was employed for a couple of months at the Susman, Schermer law firm.

THE COURT: He was indeed.

MS. FLEISSIG: And I don't believe he had any interaction with your Honor; but I wanted to make sure you were aware of that.

THE COURT: I do recall that. He was an employee of the firm at the same time I was an employee of the firm.

MS. FLEISSIG: That's correct. Okay.

THE COURT: Other than making the observation, do you wish to make any motion in respect of that?

MS. FLEISSIG: No, your Honor.

THE COURT: Okay.

MS. FLEISSIG: We think the relationship was so tenuous and so long ago that it wouldn't have any bearing.

THE COURT: Thank you. Mr. Cardozo's letter speaks to basically one issue I think, and that is the issue of an alleged restriction of sale.

MS. FLEISSIG: Yes; and I'm prepared to [6] address that first if you'd prefer, your Honor.

THE COURT: Sure, why don't you go ahead, since this is the only objection you've received.

MS. FLEISSIG: Certainly. We basically have two responses to that, your Honor. First of all, I don't believe that Mr. Cardozo has any standing to raise this objection. He is totally a stranger to this proceeding. IEC is not a creditor in this proceeding, neither is Mr. Brown, neither is Mr. Miller. And I have for your Honor the case of *Indianapasco* and especially the second page of that case, your Honor, relates strict—relates specifically to the standing of a stranger to the proceeding to object when no parties in interest have objected.

And that was objection to a proposed sale, but I would submit that the same applies here. He certainly does not fall within the people entitled to be heard under Sec-

tion 11.09 of the Code. And to the extent that Mr. Brown is objecting to our plan of reorganization, it applies to him as well in substance. And that is a copy your Honor may retain.

THE COURT: Thank you.

MS. FLEISSIG: Speaking—even if there [7] were something to be heard from Mr. Cardozo, I do not believe that there are any objections of any substance that are in any manner material to this proceeding. Mr. Cardozo has attached several documents to his objection.

And if I can just speak to them in order; he argues that we are somehow making the creditors—involving the creditors of Mr. Toibb in the business of IEC. And that's nonsense, because we specifically state in our disclosure statement that we are not giving them a security interest; we are not assigning them any interest.

We merely say if Mr. Toibb ever receives any dividends, if he ever receives any proceeds from a sale of that stock he will pay over fifty percent to his creditors as a wholly unsecured promise.

Secondly, he says that there are restrictions on transfer which are not addressed. And I point out to your Honor that there are two separate agreements. One is a shareholder sales agreement, and the other agreement is a shareholder agreement.

THE COURT: Umm hmm.

MS. FLEISSIG: The shareholder sales agreement is the only agreement to which Mr. Toibb [8] is a party. That does not impose any prohibitions against Mr. Toibb transferring this stock for any period of time. It merely provides a first option to purchase to the corporation and if not taken by the corporation, to the remaining shareholders. That option expires in 1991, and that is all that they are given, is an option.

THE COURT: Or a first right.

MS. FLEISSIG: First right; certainly. And we would submit, your Honor, Mr. Toibb does not have any specific plans to sell that stock. Even if he did, there

would just be a first right to these individuals and the promise to pay half of the proceeds would still be valid.

And thirdly, that option expires in 1991. And the promise to pay the proceeds goes through 1994. Now, if your Honor thinks that it is material to disclose in any event, I would be happy to draft a few sentences which describes that first right to the corporation and amend the disclosure statement by interlineation.

THE COURT: Okay. Are there any other comments that you would like to address to either Mr. Brown's or—

MS. FLEISSIG: Well, I would just point out [9] one other fact, your Honor. The eight year period that Mr. Cardozo refers to in his letter pertains to a shareholder sale—shareholder agreement, to which only the other two shareholders are parties. And that is set forth as clearly on the face of the agreement as it possibly can be.

If your Honor has any doubt about these matters, I'd be happy to put Mr. Toibb on the stand and let him testify to them. But, the shareholder agreement which he says would require the agreement of other shareholders to transfer for a period of ten years just—Mr. Toibb's not party to it.

THE COURT: Umm hmm.

MS. FLEISSIG: It just has no application to them. Now, Mr.—Mr. Brown and Mr. Miller did indeed impose those obligations on themselves to keep each other in the corporation, and that's the express purpose of the agreement set out in that agreement.

From their further contact, we can—conduct, we can see that they specifically did not care to keep Mr. Toibb in the—in the—in the company. I would just—I have one major concern about this, your Honor.

[10] And that is not so much the objections to the disclosure statement because I think they're somewhat frivolous. But, rather, the fact that Mr. Brown has now taken it upon himself to send a letter to this Court offering to buy Mr. Toibb's stock and obtain a personal re-

lease for himself and others from any personal liability that may—he may have.

I believe that this offer was also referenced in Mr. Cardozo's letter. I think that both of these documents are expressly in violation of Mr. Toibb's exclusive period. And I would request that the Court not make them a part of any file that is open to the purview of creditors until such time as Mr. Toibb's exclusive period has expired. I would also request that in—

THE COURT: Why shouldn't the creditors be privy to an offer which would pay them more than eleven percent?

MS. FLEISSIG: Because your Honor, I think that this is an area that is identical to the *Wisconsin Barge* case, where ACBL was trying to get in a higher offer as a higher bidder on the property. Mr. Toibb is given, by Code, an exclusive opportunity to try and reorganize with [11] his creditors.

THE COURT: Umm hmm.

MS. FLEISSIG: And this could be no different than informally sending out a plan—a competing plan to creditors in violation of the exclusive period. It was for that very reason that the plan of ACBL was not permitted to be put before the creditors of *Wisconsin Barge*.

The court says no—the Code says no one other than the debtor can submit a plan within the first 120 days. And there are sixty additional days to confirm that plan. We have filed this plan of reorganization within the statutory period and I think that the Code intended to permit us the exclusive right to attempt to reorganize with our debtors.

And I would point out one thing to your Honor. If you look at Mr. Brown's letter, Mr. Brown does not purport to say that the stock is worth Fifty Thousand Dollars (\$50,000). Indeed, in his own language, he says he doesn't think it's worth anything. But he wants to pay Fifty Thousand Dollars (\$50,000) to get rid of Mr. Toibb because he considers him a nuisance. And he

wants to pay Fifty Thousand Dollars (\$50,000) in order [12] to obtain a personal release of liability.

And if your Honor will look at his offer, it is not just an offer to purchase the stock. He purports to obtain the stock and a release of all liability for himself, for Mr. Miller, for Mr. Cardozo, for what we believe are very egregious breaches of fiduciary duty and a blatant attempt at an improper squeeze out.

THE COURT: Well, you've hit the nail on the head. The question is, this debtor has one asset basically.

MS. FLEISSIG: That's correct, your Honor.

THE COURT: And the asset is four hundred shares of stock. The question is, should the creditors be aware of an offer to purchase that? And frankly, I think they should. Because I think that in any litigation analysis, which you do have in your disclosure statement, a comparison of what the creditors would receive in a Chapter 7 has to be at least disclosed to what the debtor is offering them. And—

MS. FLEISSIG: But your Honor, he is not purporting to state that that's the value of the stock.

THE COURT: Yes.

[13] MS. FLEISSIG: He is purporting to obtain—to buy for himself a release of personal liability.

THE COURT: I think a disclosure in the liquidation analysis section that an offer to purchase for Fifty Thousand Dollars (\$50,000) has been made, provided that you—that the debtor releases all of the officers, employees, directors of the corporation. But, you have not stated in your disclosure statement that you have any such claims.

MS. FLEISSIG: Your Honor, doesn't that essentially put—force the debtor to submit competing plans of reorganization in his own plan of reorganization? Doesn't that defeat his ability to—it seems to me, your Honor, that all we have to do from now on in a Chapter 11 case that—

If I'm a creditor and I've got a competing claim, I'm sure going to put that baby on file right away and then say, 'hey, the debtor has to put my plan in front of the creditors. I know I can't do it, but let's let the debtor go and do it.'

I think that that exc—, —that defeats the [14] entire purpose behind the exclusive period that is accorded to the debtor. Either his creditors are going to find this an acceptable deal or they're not. And if they do not—

THE COURT: But they're not going to have the knowledge, they're going to say it's eleven cents or I don't know what else I get. But we know that lurking in the background without their knowledge is an offer of twice as much.

MS. FLEISSIG: That's correct, your Honor.

THE COURT: You're offering Twenty-Five Thousand (25,000) minus expense of administration claims.

MS. FLEISSIG: And that is certainly what happened in the *Wisconsin Barge* case as well. And that offer was not permitted to be put forth in front of the creditors, to preserve the debtor's exclusive period.

THE COURT: Umm hmm.

MS. FLEISSIG: And perhaps it is a little bit unfortunate. But there are no creditors here today. The creditors have not shown a substantial interest. And there are more interests at stake here—

THE COURT: Well, wait a minute. Wait a [15] minute. Mr. Brown's letter was received on March the 3rd. As you've indicated, it was sent to me with a copy to you. The creditors are without knowledge of this.

MS. FLEISSIG: As they should be, your Honor.

THE COURT: Okay. Well, that's why they're not here today.

MS. FLEISSIG: Except Mr. Brown's offer—Mr. Brown originally made the offer before the trustee to purchase the stock for Twenty-Five Thousand Dollars (\$25,000), and that proposed sale was put before the

creditors by the trustee. So they have known that Mr. Brown is out there for some time. Your Honor—

THE COURT: Well, an offer—a new offer apparently has been made in a letter dated March the 2nd.

MS. FLEISSIG: That is correct, your Honor. And I would submit that requiring this debtor to put his—put that offer in front of the creditors himself will eviscerate the exclusive period that is provided to the debtor. And it is for that reason that I think it should not even be a part of the file.

[16] I think it was a violation of the exclusive period even for that gentleman to send that letter to this Court. That is my opinion. He is accorded an exclusive period, and what Mr. Brown has done is put forth his own plan of reorganization. We have a single asset case and—

THE COURT: Would you also deny his right, if Brown had not written to the Court but appeared today and said 'I wish to communicate to debtor—to the creditor community in the same packet of information that you set out,' do you think that should not be allowed to happen?

MS. FLEISSIG: I certainly would, your Honor, because that—it contains two violations. It not only violates the exclusive period, but it puts an offer before the creditors without a disclosure statement. And no offer is to be put before creditors without a disclosure statement. So, I think that just compounds the problem that we've got.

THE COURT: It seems to me we're perpetrating deceit on the creditor community by not telling them that they could—that more money is available to them—

[17] MS. FLEISSIG: But, your Honor—

THE COURT: —and I have to weigh that, that—I want to you to make a decision but I can't tell you what your choices are against a complete and full disclosure. Let me consider this.

MS. FLEISSIG: Your Honor, may I raise two other points?

THE COURT: Sure. Umm hmm.

MS. FLEISSIG: One is—well, I guess I only have one. I had two but one of them just left. If it comes back, I'll let you know.

THE COURT: All right.

MS. FLEISSIG: I would like to point out to the Court that—we have other grounds for opposing any proposed sale to these gentlemen—to Mr. Brown or to Mr. Miller; through Mr. Cardozo or otherwise.

THE COURT: But we're not—all we're doing is asking the creditors to vote this plan up or down.

MS. FLEISSIG: I understand, but—

THE COURT: And if they vote it down, that does not say that there's going to be a sale.

MS. FLEISSIG: Oh, I understand that, your Honor. But I would just point out while your [18] Honor is considering this matter, that even if this were a 363 sale, that the Court has power to comply a sale—to refuse a sale that doesn't comply with State and Federal law. And that's set forth in the matter of *Bourne Chemical*, 54 Br. 126.

And I'd also cite to the Court the case of *In re: Table-talk, Inc.*, 53 Br. 932, 942, which recognized the necessity of the Court to maintain the integrity of its own judicial process. We think that what Mr. Brown is attempting to do here is finally cap the squeeze out that's been—they have been attempting for several years.

Mr. Toibb is here; he could get up on the stand and testify for days. He could get up on the stand and testify for hours about the conduct that has been going on here. Basically they have been attempting to hold Mr. Toibb hostage; they fired him from his job; they took away any income from the corporation; he was the founder of the corporation. It was his idea; he brought these two gentlemen in—

THE COURT: Well, if you think you have a claim I would assume that claim would be discussed in the disclosure statement. If you have a claim [19] where if you

intend to sue these folks, if you think you have a monetary claim, or if you think that you're not going to do that, disclose it and then sue them and make a huge recovery, perhaps that's your game plan.

MS. FLEISSIG: Your Honor, I would like to request—

THE COURT: What is your game plan? Are you going to sue IEC, or this company?

MS. FLEISSIG: Well, your Honor, I'm not going to do anything. Mr. Toibb may well sue his other shareholders.

THE COURT: I guarantee he's not going to sue them unless he discloses it here.

MS. FLEISSIG: Well—

THE COURT: Or if he does sue them that the benefit of that suit is going to go right to those creditors, 'cause this Court's not going to be—this Court would consider that a fraud.

MS. FLEISSIG: Your Honor, I would like to make several requests to this Court to amend the disclosure statement—

THE COURT: Sure.

MS. FLEISSIG: —by interlineation. One is found at the top of page 11, and is merely a [20] typographical error correcting the sentence that begins on page 10. It says: "In addition, for a period of six years beginning on the effective—

THE COURT: Yeah.

MS. FLEISSIG: —date, debtor will pay Class 1 creditors . . .". It should say: ". . . up to the principal amount of their claims."

THE COURT: Yeah. I picked that one up. Go ahead.

MS. FLEISSIG: The—and to make that more clear, delete the line that says: ". . . will pay to Class 1 creditors on a pro rata basis fifty percent (50%) . . .", so that it will just read: ". . . up to the principal amount of the claim, fifty percent (50%) of all amounts received as dividends, and of any proceeds received upon the sale of the stock."

THE COURT: All right.

MS. FLEISSIG: We would also like to add a sentence at the end of that paragraph which says that: "Debtor also agrees to pay Class 1 creditors pro rata until the principal amount of the claims has been paid in full one hundred percent (100%) of any amounts he may receive as a judgment in settlement of any claim—as a [21] judgment or in settlement of any claim debtor may file against the two remaining shareholders of IEC and others based upon allegations of an improper attempt to squeeze out and for breach of fiduciary duty in connection with their activities after the formation of IEC. And reference, see description of litigation; and very briefly describe in that section that he has a potential claim. We do not know what its value is.

THE COURT: And you're going to turn over the entire proceeds of any recovery?

MS. FLEISSIG: Up to—until these creditors have had their principal amounts paid in full. To the extent that there is more, I believe it should—

THE COURT: Umm hmm.

MS. FLEISSIG: —belong to Mr. Toibb.

THE COURT: Sure.

MS. FLEISSIG: But—

THE COURT: Is there any incentive for him, then, to prosecute his lawsuit?

MS. FLEISSIG: Certainly, your Honor, because if— if he does recover, there is much, much more at stake here than the amount that is owed to these creditors. And this was Mr. Toibb's [22] life for eight years. This has not been a pleasant experience for him, and not one that he is happy with.

I do not believe that Mr. Toibb—from having worked with him these few months, I do not believe that Mr. Toibb is ready to let this matter go.

THE COURT: Certainly a disclosure of that nature is called for.

MS. FLEISSIG: Your Honor, one other amendment by interlineation; it is not terribly likely. But, in the

event that Mr. Toibb is able to work something out with his creditors—right now, we have language in there saying that he will not encumber the stock or dispose of it except to a bona fide purchaser at an arm's length transaction.

We would like to make plain that if the corporation can go forward on a go forward basis that he may well need to encumber the stock in order to get financing for the corporation.

THE COURT: You can make the disclosure. Let me have a red line copy as well as a clean copy of any changes.

MS. FLEISSIG: Certainly, your Honor.

[23] THE COURT: Page 2, would you change the address so that ballots are sent to you—your office, to your attention?

MS. FLEISSIG: I certainly will, your Honor.

THE COURT: On pages 10 and 11, you've made the change that there was a typo. However, on page 11—on page 10, in the last paragraph, paragraph entitled "C", page 10.

MS. FLEISSIG: Umm hmm.

THE COURT: You tell me that the creditors are listed on the debtor's schedules at One Hundred and Thirty-Seven Thousand Dollars (\$137,000).

MS. FLEISSIG: Yes.

THE COURT: Add a sentence and tell me what the claims are. You've listed One hundred and Thirty Seven (137); the claims filed may be higher or lower.

MS. FLEISSIG: I certainly will; I think that—

THE COURT: I just want the—you know.

MS. FLEISSIG: —at most, it's a few hundred dollars. All claims have been filed already. But I will correct that to the actual amount.

[24] THE COURT: You know what I'm saying; if—if there's any large difference, let the creditor—

MS. FLEISSIG: I certainly will.

THE COURT: —community know about it.

MS. FLEISSIG: We have those dollar amounts.

THE COURT: I thought you were very clever on page 11.

MS. FLEISSIG: Let me see where.

THE COURT: Well, I'll tell you where. Under the provision entitled "Additional Provisions for Treatment of Impaired Classes"; the additional treatment for the impaired classes is that they're going to by either accepting the plan or voting for it or any number of different activities, they are deemed to waive, relinquish and release all of their rights and claims against the debtor. This is under the caption of additional provisions? Why don't you also call it—

MS. FLEISSIG: And release?

THE COURT: —discharge or whatever?

MS. FLEISSIG: And discharge; certainly, your Honor.

THE COURT: Discharge the debtor; whatever.

[25] MS. FLEISSIG: Would you like me to put in further that we are only talking about rights and claims that we have—they have against the debtor, I—

THE COURT: Pre-petit'on.

MS. FLEISSIG: Pre-petition.

THE COURT: Any claims arising pre-petition.

MS. FLEISSIG: I did not mean to be clever. I don't even think—

THE COURT: That's all right.

MS. FLEISSIG: —I started that as my own language.

THE COURT: Is there a transition problem between pages 13 and 14?

MS. FLEISSIG: Yeah. It looks like a sentence was dropped, your Honor.

THE COURT: Okay. Lastly—I know I'm making you make a lot of changes.

MS. FLEISSIG: That's all right. We have a word processor.

THE COURT: Apparently. You've disclosed the lawsuit that may be filed, or at least the claims held by Mr. Toibb as additional assets.

MS. FLEISSIG: That's right.

[26] THE COURT: Also, I'd like for you to disclose two things that are disclosed in every disclosure statement of mine. List all claims to which objections will be filed. And secondly, all intended actions to be brought under any avoiding powers of the Code, preference 548 whatever.

MS. FLEISSIG: Umm hmm.

THE COURT: So that nobody is surprised.

MS. FLEISSIG: Will do, your Honor.

THE COURT: Now, the last thing I need to do is get you a little order with respect to whether the Brown offer or the offer contained in the Brown letter is to be disclosed. And let me consider what you have said, which is basically that you think it's an invasion of the exclusive period and the standing provision and the case citations you've given me.

MS. FLEISSIG: And also point out to your Honor that what they are attempting to do is a squeeze-out of Mr. Toibb. And if they're—I believe that they are attempting to use the facilities of this Court to effect that. And I would hand your Honor one other case from the First Circuit, 1986, that defines exactly what's gone on here. And I think it would be an improper [27] use of the Court processes to permit them to try and do this within the Bankruptcy Court.

THE COURT: Let me read these cases then.

MS. FLEISSIG: Certainly; thank you, your Honor.

THE COURT: Thank you.

MS. FLEISSIG: I would—

THE COURT: We're just going to have to leave in limbo your disclosure statement until I can get you an order.

MS. FLEISSIG: Your Honor, to the extent that the balloting process would take more than sixty days, we—

THE COURT: Sure.

MS. FLEISSIG: —would request an extension.

THE COURT: Of course.

MS. FLEISSIG: I would also point out, your Honor, we did notice up for hearing this morning the fee requests of Mr. Radloff and Mr. Lang when they were trustee and attorney for trustee in this matter.

THE COURT: That's certainly—

MS. FLEISSIG: And we've received no objections to them. We have no objections to [28] those fee requests. I believe Mr. Radloff is still here.

THE COURT: Mr. Radloff, would you like to step up? It was the trustee's fee application for what? Sixteen Hundred and Ninety-Six Dollars (\$1,696); is that correct?

MR. RADLOFF: I think that was the attorney's fees application, your Honor.

THE COURT: Pardon me; you're right. All right. The debtor has no objection to a Five Hundred Dollar (\$500) allowed claim for trustee's fee?

MS. FLEISSIG: I'm sorry, your Honor?

THE COURT: No objection to the Five Hundred Dollar (\$500) request?

MS. FLEISSIG: No objection from us or any creditors.

THE COURT: All right. We'll allow these to be paid pursuant to the terms of the plan.

MR. RADLOFF: That's fine, your Honor.

THE COURT: Thank you.

MR. RADLOFF: Thank you.

THE COURT: Thank you, Ms. Fleissig. Anything further?

MS. FLEISSIG: Your Honor, I just would [29] point out that Mr. Toibb is here if you feel any testimony from him would be helpful. I'm sure he'd love to talk to you about this.

THE COURT: I think you have done a capable job this morning.

MS. FLEISSIG: Thank you.

THE COURT: Thank you.

AFFIDAVIT

STATE OF MISSOURI)
) ss
 COUNTY OF ST. LOUIS)

I, SHELDON BARUCH TOIBB, Debtor in the above cause, having been duly sworn upon my oath, hereby acknowledge that, to the best of my knowledge, information and belief, the audiotape record provided to Mary Y. Hardy, is an exact duplicate of the audiotape record of all of the proceedings conducted before the Honorable Barry S. Schermer on March 7, 1988, in the above styled bankruptcy, which was procured by me from the Clerk of the Bankruptcy Court, Eastern District of Missouri, Eastern Division.

/s/ Sheldon B. Toibb
 SHELDON B. TOIBB

SUBSCRIBED AND SWORN to before me this 14th day of October, 1988.

/s/ Mary Y. Hardy
 Notary Public

[Certification Omitted in Printing]

UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF MISSOURI
 EASTERN DIVISION

Case No. 86-02881-BSS

IN RE SHELDON BARUCH TOIBB,
Debtor

At Saint Louis, in this District, this 8th day of March, 1988.

ORDER

Upon Motion of the Court, it is

ORDERED that Debtor show cause, before the undersigned in United States Bankruptcy Court Room No. 3, 7th Floor, U. S. Court House, 1114 Market Street, St. Louis, Missouri, 63101, on March 30, 1988, why this Chapter 11 case should not be dismissed, for Debtor's failure to qualify as a Chapter 11 Debtor.

/s/ Barry S. Schermer
 BARRY S. SCHERMER
 United States Bankruptcy Judge

Copy mailed to:

Sheldon Baruch Toibb
 Debtor
 8640 Olive Blvd.—Apt. A
 St. Louis, MO 63132

Audrey G. Fleissig
 Attorney for Debtor
 720 Olive St.—24th Floor
 St. Louis, MO 63101

Stuart J. Radloff
 Attorney at Law
 7777 Bonhomme—Suite 1400
 Clayton, MO 63105

and

All creditors and other parties in interest

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 86-02881-BSS

IN RE: SHELDON BARUCH TOIBB,
Debtor.

TRANSCRIPT ON APPEAL

March 28, 1988

APPEARANCES

Peper, Martin, Jensen, Maichel & Hetlage, 720 Olive Street, 24th Floor, St. Louis, Missouri 63101, by Audrey Fleissig, Esq., appearing on behalf of debtor.

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[3] The following cause came on for hearing before the Honorable Barry S. Schermer, Judge of the United States Bankruptcy Court, Eastern District of Missouri, Eastern Division, at St. Louis, on the 28th day of March, 1988.

The Debtor, Sheldon Baruch Toibb, was present in person and by attorney Audrey Fleissig.

[4] PROCEEDINGS

THE COURT: We'll go ahead and take up the matter of Mr. Tobb.

MS. FLEISSIG: Mr. Toibb, sir.

THE COURT: Toibb, I'm sorry.

MS. FLEISSIG: Thank you.

THE COURT: Miss Fleissig appears today on behalf of Mr. Toibb, in response to the Court's order to show cause. And let me explain why this was set. I had heard earlier in the month, I believe, an application for approval of the disclosure statement. And the more I reviewed the disclosure statement, it dawned on me; why are we in a Chapter 11 position here?

So, I deferred consideration of the—without impeding—

MS. FLEISSIG: Umm hmm.

THE COURT: —the debtor's ability or time constraints which we'll get to in awhile; that will not be impaired. But while I'm—but while we're considering this other matter—

So, tell me why on the date of filing your client was eligible for relief, and why I did not err—which I think I may have—in granting this conversion?

[5] MS. FLEISSIG: Well, your Honor, I am—as I assume your Honor is referring to—aware of the *Wams-ganz* case.

THE COURT: Certainly.

MS. FLEISSIG: But that is not a case which I think in any manner controls this situation. This is a most un-

usual bankruptcy proceeding; it's got a lot of unusual facts. And the only party that seems to be raising any dispute in this matter is a party that's not a party to this bankruptcy and not a party in interest.

THE COURT: Are you talking about the Court?

MS. FLEISSIG: No, no, your Honor. I'm talking about Sidney Brown.

THE COURT: All right.

MS. FLEISSIG: The—well, that's an interesting question. Since 1981, your Honor, Mr. Toibb has worked as nothing other than an independent contractor. He started a business in 1983 with Mr. Brown and Mr.—with Mr. G. William Miller. It was his idea, his business; he was retained in that business as a consultant. We have Mr. Toibb here, your Honor; we have a copy of that consulting agreement.

He was no one's employee; he has not since [6] 19—, —since the early 1980's ever been anyone's employee. He has at all times functioned as an independent contractor. Mr. Toibb believed he had created for himself and assured himself a future as a consultant in the alternative energy field. He still remains a shareholder of Independence Electric Corporation.

However, in 1983, the other two shareholders in the corporation terminated—we believe wrongfully—his consulting contract, and have been attempting to get his stock ever since.

THE COURT: Now, when—when did he start the business; in '81?

MS. FLEISSIG: Yes, your Honor.

THE COURT: The con—

MS. FLEISSIG: Excuse me, in 1983. The termination was in 1985. I'm giving you two wrong—two wrong time periods.

THE COURT: So, the consulting agreement was dated in 1983?

MS. FLEISSIG: That is correct, your Honor.

THE COURT: In 1985, wrongfully or otherwise—

MS. FLEISSIG: Right.

THE COURT: —that consulting agreement was [7] terminated.

MS. FLEISSIG: By—by the other two shareholders. However your Honor, Mr. Toibb remained there. In fact, Mr. Toibb even after this bankruptcy was filed was still requested to do work for Independence Electric Corporation. For over a period of over a year, the discussions were going on back and forth, back and forth, what were they going to attempt to exact from Mr. Toibb for either his stock or for him to continue in a consulting arrangement with IEC.

And Mr. Toibb had to retain counsel and incur considerable expenses during that time period. Now, there are several things to keep in mind, all of which Mr. Toibb can testify to. Many of his debts that are reflected on his schedule were debts that he ran up during this time period, many of which were business related.

THE COURT: Well, what was—focus for me, if you will, on October 2nd, 1987.

MS. FLEISSIG: Right.

THE COURT: What was—he was an employee then, was he not?

MS. FLEISSIG: No. No, your Honor, he was not an employee—

[8] THE COURT: I see.

MS. FLEISSIG: —and he is not an employee now.

THE COURT: What is his—during the year 1987, what did Mr. Toibb do to earn a living?

MS. FLEISSIG: Mr. Toibb is employed as an independent contractor as a private fund raiser. He—originally when this motion—he, he—that began in May of 1987, your Honor, while the 7 was pending. But before this was converted to a Chapter 11.

He has since acquired a second charity for which he is a private fund raiser. We—he works out of his home or out of those offices. Some of his expenses are reimbursed and some are not. For instance, he pays for his own

gasoline; he pays for his own telephone; his own car expenses. Some of his direct expenses are reimbursed, some are not.

Mr. Toibb has earned money—

THE COURT: Would it be better—

MS. FLEISSIG: —during this—

THE COURT: —if he testified, or would you prefer he did not take the stand?

MS. FLEISSIG: Oh, no. I am more than happy [9] to have him testify, but what I would like in, in completing this discussion of why I believe a Chapter 7—a Chapter 11 is appropriate; I think it is appropriate solely on the basis of the fact that he is an independent contractor working for these charities. Absent protection of this bankruptcy court, every dollar he earns is going to be attached by his creditors.

Secondly, this pro—, —this bankruptcy process itself is integral to Mr. Toibb at this point attempting to continue what we believe is his right as a consultant with Independent Electric—Electric Corporation. And there is considerable promise for financial reward, not just for Mr. Toibb, but for his creditors.

And, as your Honor may recall from the disclosure hearing, we are more than willing to amend our disclosure statement to give to Mr. Toibb's creditors every penny he gets. Nobody's trying to keep anything from his creditors here.

THE COURT: I don't want you to imply by my show cause that I am desirous or coercing your client to give more to his creditors than he desires to in his plan. That's not my intent.

MS. FLEISSIG: Okay.

[10] THE COURT: But rather to see if I had erred—

MS. FLEISSIG: Certainly.

THE COURT: —back in October in converting this case.

MS. FLEISSIG: Would you like to put Mr. Toibb on the stand now?

THE COURT: Yes—yes, ma'am.

(To the Witness) Mr. Toibb, would you raise your right hand please? Do you solemnly swear the testimony you're about to give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT: If you would be seated over here, sir?

MS. FLEISSIG: Your Honor, if you'll just give me a moment to mark some exhibits?

THE COURT: Certainly.

[11] SHELDON BARUCH TOIBB,
called as a witness herein, having been first duly sworn upon his oath, was examined and testified as follows, upon,

DIRECT EXAMINATION

BY: MS. FLEISSIG:

Q Mr. Toibb, would you tell me what your educational background is?

A I have a Bachelor's degree in political science; a Juris Doctor degree and a Master of Laws degree.

Q Mr. Toibb, in the 1990's, you were engaging yourself in the energy field; is that correct?

A Yes, I was involving myself in the energy field.

Q What was the first experience that you obtained in the energy field?

A That was in the year 1979 to 1980; I was working on—as a consultant to a small law firm, Brand & Hall in Washington, D.C., in which I acted as a discovery assistant on an anti-trust case in the electrical energy industry.

Q Okay. What was your next employment in the energy field? Or, your next endeavor in the energy field?

[12] A I served as a staff attorney in the office of general counsel at the Federal Energy Regulatory Commission in Washington, D.C. for a year and a half.

Q And what period of time what that?

A That is from March of 1980 until September of 1981.

Q And, very briefly sir, what did you do there?

A I worked with natural gas pricing regulations and also licensing of hydroelectric power projects.

Q Okay. And you said you did that until September of '81?

A Yes.

Q And I take it then you left the Federal Energy Regulatory—

A Yes.

Q Commission? And what did you do when you left there?

A I wrote a business plan and attempted to raise venture capital to create an alternative energy development company in the hydroelectric power field.

Q I'm going to hand you what I've marked as Exhibit Number 1.

A Yes. This is my business plan that I [13] created during the year 1981 and 1982. It is called The Strategy For The Creation Of An Independent Hydroelectric Generation Company In The South. This was the business plan which I sold to Electric Corporation for which I exchanged—for which I received my stock and consideration.

MS. FLEISSIG: I'm sorry, your Honor. I proceeded to pre-mark these exhibits. Would you like your clerk to mark them?

THE COURT: No, that's fine. All right.

Q Mr. Toibb, during what period of time were you putting this business plan together?

A From September of 1981 until March of '83, when Independence Electric Corporation was founded.

Q And where were you officed during this time period?

A I was officed in two different locations; from—for most of the time, close to a year, I was housed in the

office of the law firm of Chapman, Duff and Paul in Washington, D.C. After which at that time I operated out of my house where I was living—my residence.

Q And was Chapman, Duff and Paul assisting you in putting together your business plan?

A Yes. Chapman, Duff and Paul helped me put [14] together the business plan and—under the expectation they'd be regulatory counsel for the firm if venture capital was raised and a company was formed.

Q And were you working with any other consultants during this period?

A Yes, I was working with Stone & Webster Engineering Corporation and Stone & Webster Management Consultants out of Denver, Colorado, who helped—

Q Okay. And—

A —who put together some of the computer runs and numerical and financial formulations for my business plan with me.

Q And you were located in Washington, D.C. during that time?

A Yes. I might also add I was also working with a professional accountant from the accounting firm Ernst & Whinney in Washington, D.C. during this time period, to help me put together the business plan.

Q I hand you what's been marked as Exhibit 2.

A Yes.

Q Can you identify that document?

A Yes, this is an abbreviated version of my business plan which was presented earlier. This was presented to Mr. Sidney Brown and Mr. G. William Miller from which they decided to invest money in the—in al [15]—in my business plan and Independence Electric Corporation.

THE COURT: Thank you.

Q And Exhibits Number 1 and Exhibits Number 2 are documents that you drafted?

A Yes.

Q Now, we're up to a time—

A Entirely by myself.

Q You—excuse me?

A Entirely by myself.

Q We're up to a time period of March, 1983.

A Yes.

Q In putting together and beginning this business, did you incur debts?

A Yes, I did.

Q Okay. By March of '83, was there any given amount by which you were in debt?

A Yes. I was roughly approximately fifteen to twenty thousand dollars in debt at that time period, which I had run up on personal expenses for travel expenses in going to Stone & Webster in Denver and going to potential venture capitalists.

And in incurring photographic expense, postage expense, typing expense, other types of expenses in formulating my business plan, plus [16] automobile expenses, related and involved.

Q Now, wait. Exhibit Number 2 you identified as a document that you gave to Mr. Miller and Mr. Brown pursuant to which they invested money in your plan; is that correct?

A Yes, that—they—I did not give that document to them directly, but it was given to them on my behalf to invest money in my plan.

Q Okay. And was a corporation formed as a result of those efforts?

A Yes, it was. Independence Electric Corporation was formed in November of 19—, —I'm sorry. In March of 1983.

Q And were you a shareholder?

A I am a shareholder of Independence Electric Corporation.

Q Are there other shareholders in Independence Electric?

A Yes, there are two other shareholders; Mr. G. William Miller and Mr. Sidney J. Brown.

Q And what percentage of the shares do you hold?

A I own twenty-four percent of the stock in the company. Four hundred shares out of an outstanding sixteen sixty-seven (1,667).

[17] Q And the other two gentlemen together control the remainder of the shares?

A Yes, the other two remaining gentlemen control seventy-six percent of the shares of the company.

Q Okay. I hand you what I've marked as Exhibit Number 3.

A Yes.

Q Can you identify that document?

A This is the consulting agreement dated March 22nd, 1983 from Independence Electric Corporation, signed by Mr. G. William Miller, President and myself; which is my consulting agreement with the company at which I would be paid an annual rate of fifty thousand dollars a year, plus to be reimbursed various expenses which I would be paying out of my pocket as an independent contractor with the Independence Electric Corporation.

Q Were you ever employed as an employee of Independence Electric Corporation?

A I was never employed as an employee of Independence Electric Corporation.

Q And how long did you anticipate your consultancy with Independence Electric Corporation would continue?

[18] A I expected it to continue infinite dura—, — of indefinite duration, and hopefully infinite duration, 'cause I would have an on-going term with the company which I founded.

Q Now, you said in March of 1983 you had incurred debts in getting this business started of about fifteen thousand dollars; is that correct?

A Yes. That is correct.

Q What happened to those debts?

A Mr. Sidney Brown gave me a personal loan for fifteen thousand dollars which I used to pay off those

debts, which loan was subsequently assigned to the company.

Q And—

A As return of part of his capital contribution.

Q And did you pay off those debts through your consulting agreement?

A Yes, I paid them off at a rate—I paid off that note to the company in terms of five hundred dollars a month, which was withheld from my consulting fees. And—and the balance was paid off in June of 1985.

Q Now, during what time period were you employed as a consultant—was IEC continuing it's [19] contract with you as a consultant and were you indeed receiving payments?

A I received payments as a consultant from Independence Electric Corporation, except for those time periods that payments were unlawfully withheld from me under my consulting agreement, which subsequently were made up at a later date.

Q During what time period?

A From March—

Q March—

A March of '83 until the end of April, 1985.

Q Okay. And what services were you performing for Independence Electric Corporation during that time period?

A I would target potential hydroelectric sites to pursue for licensing; for possible development and construction. I, I, I researched economic marketing of electricity for projects to be pursued by Independence Electric Corporation, such as what electric utilities would be potential purchasers in the projects.

I undertook a lot of drafting of formulation of legal pleadings before the Federal Energy Regulatory Commission for licensing of projects. I helped undertake drafting a potential prospectuses for private placements to raise addition funding for the company.

[20] Q Mr. Toibb, we've cut you off in the interest of time, because—

A Okay.

Q —this isn't terribly—

A Okay.

Q Everything—

A I'm just trying to respond to your questions.

Q —that you did is not necessarily relevant to the particular issue before this Court. Are there other activities that you performed on behalf of IEC, as well as—

A Many others, which I could elaborate in more detail if the Court wanted it.

Q Okay. And where were you working during that time period; where were you officed?

A From the period of March of 1983 until late—until January 1984, I was officed—housed in—my office was in the offices of G. William Miller and Company, a merchant banking firm in Washington, D.C. From the period of January '84 until the end of April, 1985 and even thereafter after my consulting agreement, I worked out of my house—my apartment in Washington, D.C.

Q And you were performing all of the same [21] functions for Independence Electric Corporation?

A Same functions; identical. Nothing changed whether I worked in the merchant banking offices of Miller or in my own personal apartment.

Q And who paid for your rent during this time period?

A I paid for my own rent.

Q And who paid for your phone bill during this time period?

A I paid for my phone bill, except for part of it was reim—, —part of the long distance was reimbursed by G. William Miller—by Independence Electric Corporation.

Q And any—did you obtain business furniture for Independence Electric Corporation?

A Yes, and that business furniture was paid for out of my own pocket.

Q Okay.

A Such as file cabinets, bookcases for books which were purchased by Independence Electric Corporation. And I also incurred things like gasoline, postage, photocopying expenses, other types of normal office expenses and—

THE COURT: What's the point of this; to show me he wasn't an employee?

[22] MS. FLEISSIG: No, your Honor. He incurred many expenses during this time period which were not reimbursed by Independence Electric Corporation. Part of the expenses that he incurs directly during this time period and that he incurs immediately after this time period were related to his work with Independence Electric Corporation and were not reimbursed. And some of these are, indeed, the debts that he has in this bankruptcy proceeding right now.

THE COURT: Okay. Do you think the nature or category of his indebtedness bears on the issue of whether he's qualified to be a Chapter 11 debtor?

MS. FLEISSIG: Your Honor, I don't think that the case law, so far as I have read it, is terribly clear. And since *Wamsganz*, I am not aware of cases that have interpreted. I know that although the Sixth Circuit has ruled similar to *Wamsganz*, some cases that have come down within that circuit subsequent to the Sixth Circuit's ruling have also looked to issues such as were these business debts or were they not business debts.

All—Mr. Toibb is here, and—

[23] THE COURT: Sure.

MS. FLEISSIG: —can testify for your Honor that many of the debts that he has now are not personal debts, not consumer debts, but rather are indeed business debts. And it is our hope in this bankruptcy proceeding not merely to reorganize Mr. Toibb's business as a private fund raiser, but also to permit him the opportunity and the chance to reorganize in connection with his relationship to IEC.

THE COURT: All right. Thank you.

MS. FLEISSIG: And if your Honor—if your Honor wants to accept merely my statement to that effect rather than testimony, we can move on.

THE COURT: Well, your statement plus the schedules would reflect that they were—these debts were incurred during that time period.

Q Mr. Toibb, your consulting agreement was terminated in April of 1985; is that correct?

A That is correct.

Q And in April of 1985, were you once again in debt?

A Yes, I was in debt in April of 1985. I had accumulated roughly twenty to twenty-five dollars in debt, partially accumulated to—in the fact that a [24] lot of my office and personal and travel expenses run up on behalf of Independence Electric Corporation were not reimbursed.

Q Okay.

A Properly.

Q And how was your consulting agreement terminated, sir?

A My consulting agreement was terminated by letter, and I was—I believe it was terminated unlawfully.

Q Was it terminated orally at some time period before it was terminated by letter?

A What happened was, quite frankly, was in the beginning of March, 1985 Mr. Sidney Brown proposed an ultimatum to me. He told me I should give four percent of my stock to an employee of Mr. Miller's named Mr. Michael Cardozo. I refused and therefore my—

THE COURT: Now, the question was: was your agreement terminated verbally before you received the letter? I really don't want to hear a history of who hit whom when, but—

THE WITNESS: Okay.

THE COURT: —rather the question, I think, was as I've stated. Did somebody verbally terminate the agreement before you received a [25] writing terminating the agreement?

THE WITNESS: Yes, I received verbal termination of the agreement, although the terms of the agreement called for legal termination only to be in writing.

Q And was your check withheld during some period prior to the time that the termination was effected in writing?

A Yes, my verbal termination was—of funds was withheld from March and April of '85. Even though that—

Q Thank you Mr. Toibb. Your affirmative answer of yes really will suffice.

A Okay.

Q Now, Mr. Toibb, would you tell me what occurred during the time period from April of '85 through July of 1986?

A Several things happened. First of all—

Q Tell me what happened in connection with your relationship with IEC.

A Various offers and proposals went back and forth which would allow me to keep my stock in IEC and I have a potential consulting agreement to have the company go forward on its license applications and to undertake a private placement memorandum.

[26] I ran up various legal fees and other types of expenses during this time period, trying to protect my right to be a consultant with IEC and to protect my stock interest in the company.

Q Did you retain Mr.—the law firm of Dickstein, Shapiro?

A Yes, I retained Mr. Arthur Galligan at the law firm of Dickstein, Shapiro in Washington, D.C., which I ran up legal expenses close to ten thousand dollars in trying to negotiate a protected consulting agreement with IEC.

Q Mr. Toibb, did you pay a retainer to Mr. Galligan?

A Yes, I did; six thousand dollars.

Q And from where did you obtain those funds?

A I obtained those funds by a line of credit on one of my personal credit cards.

Q And that is at—still one of the debts that exists in this—

A Yes, it is.

Q —bankruptcy proceeding except there is interest running on it; is there not?

A Correct.

Q Or, interest ran during the time period—

A Correct.

[27] Q —that you incurred it—

A Correct.

Q —until you filed for bankruptcy?

A Correct. Plus a few hundred more than the six thousand.

Q Your schedules also show twenty-six hundred dollars to Dickstein, Shapiro. Is that part of the same indebtedness?

A Yes, that's part of the same representation; yes.

Q Did you hire any other attorneys during this time period?

A Yes, I had Jerry Tockman, a lawyer in St. Louis—Tockman, Mocerf & Wolk here in St. Louis. In which I ran up expenses not on a legal fee matter, but I ran up expenses like long distance telephone, postage, Federal Express; expenses like these in communicating with Mr. Tockman as far as my—vis a vis my relationship with my partners.

Q And while all of these discussions with your partners were ongoing, were you receiving any payments from them relative to your consultancy?

A None.

Q Now, your schedules reflect sir, an MCI bill in the amount fifteen hundred and twenty-four dollars [28] for—

A Yes.

Q —for long distance telephone charges.

A Yes.

Q You also have a C&P telephone for thirteen hundred and three dollars and forty-two cents—

A Yes.

Q —for 1986.

A Yes.

Q Were those charges related to your efforts to retain your interest in IEC?

A Absolutely. That had to do with talking with both Mr. Tockman and Mr. Galligan long distance. I might also add that I kept ongoing relationships with Stone & Webster Engineering Corporation in Boston, Massachusetts and Stone & Webster Management Consultants in New York; ongoing telephone conversations for which I was not reimbursed, trying to—trying to track the progress of Independence Electric Corporation.

Q Sir, did you also have discussions with an attorney in Philadelphia regarding a potential cause of action?

A Yes, Mr. Harold Kohn in Philadelphia, Pennsylvania.

[29] Q And are you continuing to discuss this matter with Mr. Harold Kohn—

A Yes, I'm discussing this matter with Mr. Harold Kohn as far as potential representation in a potential lawsuit by myself.

Q Based on a minority squeeze out?

A Based on a minority squeeze out and other—many other causes of action.

Q Okay. Mr. Toibb, during this time period from April of '85 to July of 1986, were you also looking for other engagements in the alternative energy field?

A Yes, I was looking for—to, to obtain consultancies for an alternative income in—with four or five other types of areas. Number one, alternative energy development companies like Independence Corporation, in California and other places in the United States. Number two, investment banking firms in St. Louis and New York.

Number three, utility consulting departments of Big Eight accounting firms. Number four, the legal staffs of various electric utilities. And number five, economic consulting firms both in Chicago and St. Louis which deal with management consulting in the electric utility economic field.

[30] And are you continuing to this day to not only obtain a—reobtain your position with IEC but also obtain other consultancies in the—

A Yes, I'm still continuing to look—

Q —energy field?

A —for other potential consultancies in the alternative energy and electric power fields. And I am also looking to reestablish a consultancy agreement with Independence Electric Corporation, which my stock, quite frankly, is essential for me to estab—, — reestablish a relationship with.

Q Have you—

(tape runs out at this point)

A —my interest because of their various threats to quit and let the company die during the last few years.

Q And would you anticipate that you would have a future with the company if a deal of that sort could be structured?

A If I found a potential buyer for their interests for which it was a mutually agreeable sale and I found such a white knight, I would have expected I would have a continued consultancy with Electric—Independence Electric Corporation in conjunction with my continued twenty-four percent stock ownership.

[31] Q Okay. Mr. Toibb, during this time period when you have been looking for other employment as a consultant in this same energy—alternative energy related field, have you run up other expenses related directly to those?

A Yes.

Q To that endeavor?

A Yes. A long distance—

Q Can you approximate that—well, are those expenses—are some of those expenses reflected on your schedules?

A Absolutely.

Q Okay. Did you—by July of 1986, had you worked out anything with the Independence Electric Corporation shareholders?

A No. No—no agreement had been made in, in, in—what date are you talking now?

Q July of 1986.

A No agreement had been reached in 1986, and I thought the company was dead, as Mr. Miller had gave—had handed in a letter—a resignation along with Mr. Cardozo as treasurer. And they had both quit as the company—I thought the company was dead.

Q Okay. So you thought the company was dead in the summer of 1986. And what—

[32] A I'm sure Mr. Brown also told me something—

A Mr. Toibb, please.

A Okay.

Q Let me take a little bit more—

A Okay.

Q —command of this proceeding.

A Okay.

Q In the summer of 1986, you thought the company was dead?

A I thought it was dead, yes, in late summer of '86.

Q Based upon representations that had been made to you by the remaining shareholders in the corporation?

A Correct; by both of them.

Q And what did you do?

A I moved back to St. Louis, Missouri thinking I had a dead company on my hands.

Q And what did you do thereafter?

A I filed for Chapter 7 bankruptcy—

Q Bankruptcy.

A —because I thought the stock was totally worthless and the company was dead.

Q And that was in November of 1986?

A Sure, it was.

[33] Q Did—have you since found out that Independence Electric Corporation is not dead?

A Sure, in January of 1987, I found out that they'd run the company behind my back and lied to me.

Q Did they ask you, in January of 1987, to do anything on behalf of IEC?

A Yes, they asked me to go to Boston, Massachusetts and visit Stone & Webster Electric—and manag—, —Engineering Corporation with representatives of Combustion Engineering Corporation to see if Combustion Engineering wanted to invest money in Independence Electric Corporation, potentially.

And I was quite surprised to hear this.

Q And does Independence Electric Corporation hold licenses to develop hydroelectric power sites?

A Yes, hyd—, —Independence Electric Corporation presently holds four licenses; one issued in August of 1987 and three in December of '87, for four hydroelectric power plants.

Q And as far as you know today, the company is not dead, but very much alive?

A The company is very much alive today.

Q And you did not know that when you filed for Chapter 7—

A I did not know that at all.

[34] Q —did you sir? Do you—

A In fact, I was wrongfully deceived on that point.

Q Do you still believe that there is the potential for you to work something out with the majority shareholders of IEC?

A Absolutely. If this company is to go forward, I was—and I was to maintain a twenty-four percent share, I believe there is plenty of potential for all of us to have a thriving business and for me—and for me to go back and be a consultant to the company once again.

Q Do you believe that that potential exists if you do not hold your shares in IEC?

A No. No. Holding my shares is essential to that point.

Q If you do not work anything out with the creditors—with the remaining shareholders of IEC, do you believe you have a cause of action against the remaining—the majority shareholders?

A I believe a very strong cause of action against them.

Q And you do hold a law degree do you not, sir?

A Yes, two of them.

[35] Q And would you be willing, as part of your plan of reorganization in a Chapter 11 proceeding, to share the proceeds from any such lawsuit with your creditors?

A Absolutely. I'm not trying—okay.

Q Absolutely is sufficient Mr. Toibb. And to the extent any purchase of your shares is affected as part of some work out, are you willing and proposing to share those proceeds with your creditors?

A Absolutely. And the same thing with any potential stock dividends that I receive from the company, too, if the company becomes profitable in the future.

Q And to the extent that a agreement is worked out that gets money to you but calls it consulting or something else, would you be willing to share some of the proceeds of the payments that you receive from IEC with your creditors?

A Absolutely.

Q Okay.

A You're talking about consulting fees, other types of fees in return for services—absolutely.

Q Now, sir, have you been pursuing any other line of business during the period since you filed for Chapter 7, thinking the company was—

[36] Yes, I have.

Q —dead?

A Yes, I have.

Q And what is that line of business?

A I've developed an independent contracting business as a professional charitable fund raiser for two charities in St. Louis. The first—should I go into more detail?

Q When was the first? When did it first begin?

A The first one was established in May of 1987.

Q Mr. Toibb, I am handing you a copy of what I have marked for the Court and am handing the Court as Exhibit Number 4. Can you identify that document?

A Yes. This is a letter from Rabbi Yitzchok Kleiman to yourself written last week which states that I've been serving as a consulting—a fund raising consultant with—for the St. Louis Rabbinical College since May of 1987, for the new building which they need to raise \$2.5 million dollars. And I receive twenty percent whatever I raise as a commission.

Q And are—

A As an independent contractor.

Q Do you recognize Mr. Kleiman's signature?

[37] A Rabbi Kleiman's signature.

Q Rabbi Kleiman's signature.

A Yes, I do.

Q I hand you what has also—and I am also handing to the Court—and have marked as Exhibit Number 5. Can you identify that document sir?

A Yes, this is a letter to you from Jerry S. Stein, president of Jerry S. Stein Charities, along with The Food Bank, which says—which says that I am actively pursuing a fund raising for homeless persons in the St. Louis area for which I receive ten percent of what I raise as my fee.

Q I'm giving the Court a document marked Exhibit Number 6—

A Yes.

Q —sir, and I am handing you a copy of that document. Can you identify it for the Court?

A Yes. This a copy of receipts of amounts I have raised for the St. Louis Rabbinical College Building Fund, along with subsequently expenses I incurred and along

with fees—my fees on each commission and the amount I received as a check on—in the—to the right hand column.

Q Okay. And the expenses that are reflected on here are reimburseable expenses, are they not?

[38] A Right. Those are the—those are the ones that were reimbursed in checks. Some of them are not reimbursed.

Q You incur other expenses that are not reimbursed

A Absolutely.

Q —do you know?

A Absolutely. Significant driving expenses in soliciting potential contributions; gasoline; photocopying; things like this.

Q Are you working out of your home, Mr. Toibb?

A I've worked both out of where I'm—my residence and out of the offices of the College and of Jerry Stein's office too. So, I work out of three locations.

Q And do these—for—

Q MS. FLEISSIG: for the purposes of the Court, your Honor, names were originally disclosed. The numbers are itemed—are numbered but those are each individual contributions. I didn't think any purpose would be served by disclosing those names.

Q And are your efforts as a private fund raiser for both of these charities continuing?

A Yes.

[39] Q And are you continuing to look for other opportunities and for the potential for opportunities in the energy field as well?

A Yes, I am. When I see—when I see opportunities arising in the alternative energy field in let's say—let's say a few months ago in San Francisco for example, or Los Angeles. You know, I talk to—I get on the phone and I send letters and I talk to people about my possibly joining those companies as an independent consultant.

Q Sir, since 1981 have you been employed as anything other than an independent contractor?

A No, always as independent contractor.

Q And how have you filed your tax returns?

A All of the deductions that were not allowed—that were not reimbursed by Independence Electric Corporation or these charities—but—they haven't been for this year. But, for 1984, 5 and 6, all my business deductions were itemized as Schedule C deductions on income—on my personal income tax returns as business deductions. And not as employee expenses, unreimbursable under Schedule 2106 or personal expenses under Schedule A.

Q And have—

A They have all been taken as Schedule C's.

[40] Q And have those amounts ever been disallowed by the IRS?

A They've never been disallowed by the IRS.

Q Thank you sir.

[41] DIRECT EXAMINATION

BY: JUDGE SCHERMER:

THE COURT: Mr. Toibb.

A Yes?

THE COURT: Have you received any funds from the Jerry S. Stein Charities Incorporated since January 1988?

A No, but I'm expecting a check at the end of this month. The checks—I expect the checks to be—they said the checks will be cut at the end of the month. And therefore I expect one in a couple—a few days.

THE COURT: And what monies have you earned from the Rabbinical College from May 1987 through November 1987?

A There were no monies received at that time because a brochure and other documents that had to be put together in order—in order to begin the fund raising effort. It took several months to create the brochure for the building, for which it became the sales document, or the contribution document, for which I would solicit contributions.

THE COURT: Now, for the period one year before that, between May of 1986 and May 1987, what was your source of income?

[42] A Parental support to a large extent. I moved back to St. Louis in September of 1986.

THE COURT: What was your source of income between April 1985, the date on which your consulting agreement was terminated, and the—and May of '86?

A Are you talking between May of '85?

THE COURT: Yes.

A And when, again?

THE COURT: Let's say the time you came back to St. Louis, that might be easier.

A That's September of '86.

THE COURT: Umm hmm.

A I would say that three resources of—of—of—

THE COURT: Income?

A Income in that time period. I would say there was income basically from, number one, parents; number two, friends who helped me out to some extent because they saw I was in trouble.

THE COURT: Is there a third source?

MS. FLEISSIG: You did receive payments from IEC later as result of negotiations, did you not Mr. Toibb?

A Well, I received in June of 1985—in '85, [43] back dated monies that was owed me for the amounts of April—April and—March and April that had been withheld to me.

THE COURT: Okay.

A In other words, the monies that had been withheld from me were ten thousand dollars.

THE COURT: So basically, since April of eighty—pardon me. Since April of '85 through current date, other than the funds listed on Exhibit 6—

A Yeah.

THE COURT: —your support has mostly been through friends and family?

A Yeah.

THE COURT: Now—

A I hope that—to change those significantly now. I might have basically been self-supporting since the first of this year. For the last three months since I began receiving significant fees from the Rabbinical College fund.

THE COURT: During the time of March 1983 through April 1985, when you were working under the consulting agreement, Exhibit 3, did you have any source of income other than the consulting agreement?

[44] A No.

THE COURT: Are you continuing to look for employment in the energy consulting field?

A Yes.

THE COURT: Are you desirous of re-entry into that field?

A Yes, very much so.

THE COURT: Is the charity raising a bridge between your current status and the status you wish to obtain—attain, which is being a consultant in the energy field?

A Yes.

MS. FLEISSIG: Mr. Toibb, if you don't get something in the consulting field, do you intend to keep working in the charity field?

A Absolutely. Because I mean—I, I think there's quite frankly room for me to do both.

THE COURT: Do you—would you categorize your use of Chapter 11 as a vehicle to retain your stock and to obtain an opportunity to work a settlement with your co-shareholders of IEC?

A I view it as a way to reorganize my debts, as a businessman—as an independent contractor. Through which I retain my property in life without liquidation. To that—

[45] THE COURT: What is your property in life, other than your stock of the company? And the clothes that you wear and your household goods.

A Yeah.

THE COURT: Do you have any property other than—

A No. My, my basic real financial asset is the stock in Independence Electric Corporation.

MS. FLEISSIG: Sir, do you also have a cause of action against—

THE COURT: Well, I understand his causes of action are numerous. Let me complete my examination and you can ask him anything you wish.

MS. FLEISSIG: I'm sorry, your Honor.

THE COURT: So do you—basically, you view your Chapter 11 as a means by which you can retain your stock and work a settlement then, or re-enter the energy consulting field with IEC?

A I would hope that would be a result.

THE COURT: All right. Miss Fleissig, anything further?

MS. FLEISSIG: Yes.

[46] RE-ELECT EXAMINATION

BY: MS. FLEISSIG:

Q Mr. Toibb, do you know approximately what the amount of your debts are?

A Today?

Q Today.

A Approximately a hundred and forty thousand, I think.

Q Okay. And were many of those debts directly business related?

A Absolutely.

Q Mr. Toibb, when you originally filed for Chapter 7, did you have any desire regarding those debts?

A I'm sorry?

Q When you originally filed for Chapter 7, did you have any desires regarding those debts?

THE COURT: What kind of desires do you refer to?

Q Did you seek to have your debts discharged?

A Yes, I sought to have my debts discharged.

Q And when you converted to Chapter 11, was it still your desire to work something out with your creditors so that in the—ultimately there would be a discharge of those debts?

[47] A Well, I worked out that it would be a discharge, but in the sense that they would be paid, you know, according to a reorg—, —a plan of reorganization.

[48] RE-DIRECT EXAMINATION

BY: JUDGE SCHERMER:

THE COURT: Ms. Fleissig, I believe he filed an 11 as a means, after he learned that IEC was a—not a dead company. That's why he converted the case.

(To the Witness) Of your hundred forty thousand dollars debt, sir, how much is related to your involvement with IEC? Percentage-wise, as your estimate.

Judging from the dates, it would appear that either they were related to IEC, or they were related to your schooling or living expenses; is that correct?

A I would say that roughly one-third is related to IEC; the schooling were a couple of small loans that were outstanding from years ago from college and law school. Those are the smaller amounts. And the living would be roughly the rest of—roughly the remainder of it. In fact, I would say forty percent would be—would be IEC related, when I think of all the travel I had to do to—

THE COURT: All right.

A Well, I—and you know, that includes like the business consulting and trying to obtain other [49] consultancies too, as far as my business development. Trying to, you know, hook on with other alternative energy companies or other types of business trips I took in trying to promote myself as an energy consultant.

THE COURT: Anything further of this witness, ma'am?

MS. FLEISSIG: Not on this issue, your Honor.

THE COURT: On any other issue?

MS. FLEISSIG: Well, I was not aware before I got here this morning that the motion to extend the exclusive period had also been scheduled. But I suppose we don't need any testimony from Mr. Toibb on that issue.

THE COURT: You may step down sir. Thank you. If I may have your Exhibits there?

MS. FLEISSIG: Your Honor, I believe I gave you copies—

THE COURT: Okay.

MS. FLEISSIG: —of all of the originals.

THE COURT: All right.

MS. FLEISSIG: And I would move that they be admitted into the record at this time.

[50] THE COURT: Certainly they'll be received.

Now, Miss Fleissig, is there any legal argument you want to give me at this time?

MS. FLEISSIG: On this particular issue, your Honor, only that this bankruptcy is not an easy one. The issues are not easy ones, and I don't think the issue of who constitutes a proper debtor under Chapter 11 is a very easy one in this Circuit at this time.

Because of the amount of Mr. Toibb's debts, maybe even because of the interest that ran on Mr. Toibb's debts, he is not a debtor who can qualify for any type of reorganization under Chapter 13.

So, the only proceedings that are available to him are proceedings under Chapter 11 and proceedings under Chapter 7. There are numerous cases that have come down since the *Wamsganz* case in other Circuits which have recognized that Chapter 11 should be available to someone who has some income to try and attempt a Chapter 11 reorganization, because Chapter 13 is not available to them, and that cannot have been what was intended.

I also cite to your Honor the case of *In re: Markunes*—"M-A-R-K-U-N-E-S"—78 Br. 875, from [51] the Southern District of Ohio in 1987. That was a case I alluded to previous, your Honor. Although the Sixth Circuit had

ruled similar to *Wamsganz*, this is an attempt by that bankruptcy court to—

THE COURT: Clarify?

MS. FLEISSIG: —clarify what was meant. And, in that case, the—the debtor was permitted to remain in Chapter 11, although he had something like a thousand dollars a month coming in from a business upon which—in which that he was a shareholder. And they looked at him as is he basically an employee; is he basically a consumer with consumer debts.

And based upon a Sixth Circuit ruling similar to the Eighth Circuit's ruling, that Court held that he could remain a debtor in Chapter 11. I have a copy of the case if your Honor would like.

THE COURT: Thank you, ma'am. Thank you.

MS. FLEISSIG: And there are numerous other cases that have come down as well. They are not in our Circuit, so it's difficult to say what—what will happen in our Circuit. I believe that Mr. Toibb has two businesses that he is reorganizing.

[52] One is his efforts in the energy field. And while it—we, we would not pretend that maintaining his stock is of critical importance to Mr. Toibb, we think it's of critical importance. We think he had a legal right to it, given that the only other entities that want his stock—the only other entities for which there is any value in this stock, are the majority shareholders that have been trying to get his stock since 1985.

I don't think that this Bankruptcy Court is the proper forum to let them complete that process and also buy for themselves a release. Especially when those activities don't have any relation to the value of the stock.

But, as was admitted in Mr. Brown's own letter to this Court, I think if Mr. Toibb can retain his stock—or, even cannot retain his stock—that he has recourses available to him with IEC that may—that may turn a benefit for his creditors.

He is certainly willing to share those benefits. He has already offered the exact dollar amount for those shares that the trustee proposed to sell them for when this matter was in Chapter 7.

[53] THE COURT: What's the second business?

MS. FLEISSIG: The second business that he has, which he commenced prior to converting this case to Chapter 11, is as a private fund raiser, your Honor. These charities, especially the Rabbinical College, just started up when Mr. Toibb started up with it.

It takes time to print the brochures; to make mailings to people; and while the money is not coming in as much in the early months as it hopes to in the later months, he is certainly employed in that business. And the schedules reflect that he has received more than four thousand dollars in—in a period of a few months in those endeavors.

And he hopes to continue those endeavors. If he is kicked out of the Bankruptcy Court right now, every penny he gets for those endeavors is going to be attached by his creditors. And he will have no ability to pay—it will be attached by the most aggressive of his creditors.

And his creditors will not receive payment in any ordered sense, in any ordered proceeding. He is willing to share his—his assets that he gets out of this business with his creditors. And [54] I think that's what reorganization is all about.

Were he in Chapter 7, any dollars amounts that he received would be his and his own, for his own pocket. They would be post-petition dollars. I don't think that the proper alternative in a case like this is to throw Mr. Toibb out of the Bankruptcy Court, kill any chance he has for standing on his feet and making something either of IEC or his fund raising efforts, and letting the most aggressive of his creditors take those assets.

THE COURT: Okay. Well, I agree with you that the facts in this case, Miss Fleissig, are somewhat unus-

ual. And basically categorizes as a single asset case, that being his stock.

You would have me also believe there is a second major asset and that's his cause of action. But that again is related to his stock ownership, so I'll bundle them together.

MS. FLEISSIG: Certainly.

THE COURT: And so the man has stock, or an interest in a company which he would like to use as a vehicle to get back into the active relationship with that company as a consultant. And I think that is primarily the use of the [55] Chapter 11.

MS. FLEISSIG: But, your Honor, in that regard, it—it is not different than any other independent contractor whose services are essentially consultancy may be. Those people may have no assets other than their home and their car—

THE COURT: Umm hmm.

MS. FLEISSIG: —as well. And the question here is, are those people not to be permitted an opportunity to reorganize as well? In that regard, Mr. Toibb has perhaps more assets than they do.

THE COURT: Well, neither of us have found any cases on that particular situation. All right, let me do this. Let me take this under advisement, Miss Fleissig, and let's—

MS. FLEISSIG: Your Honor, my client has raised one other point to me.

THE COURT: It's always difficult to represent an attorney, isn't it?

MS. FLEISSIG: Yes, it is. Your Honor, my client makes the point that other companies with which he is talking now have raised the point to him that with the ownership of his stock he has [56] more credibility in this—in the energy consulting field.

However, so long as he is in bankruptcy owning that stock, that is not the case.

THE COURT: All right. What I'm going to do is take the—this matter under advisement. I'm going to

continue the exclusive period to a time in the future. I'll tie it to the time of my decision on the issue of qualifying under Chapter 11, and extend the period of time to confirm a plan sixty days beyond the date that the disclosure statement has to be approved.

MS. FLEISSIG: Thank you, your Honor.

THE COURT: Now—so, I think that will clarify everything else. I'll continue the hearing on the disclosure statement.

MS. FLEISSIG: Thank you, your Honor.

THE COURT: Thank you.

[57]

AFFIDAVIT

STATE OF MISSOURI)
) ss
 COUNTY OF ST. LOUIS)

I, SHELDON BARUCH TOIBB, Debtor in the above cause, having been duly sworn upon by oath, hereby acknowledge that, to the best of my knowledge, information and belief, the audiotape record provided to Mary Y. Hardy, is an exact duplicate of the audiotape record of all of the proceedings conducted before the Honorable Barry S. Schermer on March 28, 1988, in the above styled bankruptcy, which was procured by me from the Clerk of the Bankruptcy Court, Eastern District of Missouri, Eastern Division.

/s/ Sheldon B. Toibb
 SHELDON B. TOIBB

SUBSCRIBED AND SWORN to before me this 14th day of October, 1988.

/s/ Mary Y. Hardy
 Notary Public

[Certification Omitted in Printing]

UNITED STATES BANKRUPTCY COURT

 [Title Omitted in Printing]

Opinion and Order Granting Debtor Ten (10) Days From the Date of Order to Reconvert Case to One Under Chapter 7 of the Bankruptcy Code or Face Dismissal (Printed as Appendix to Petition For Writ of Certiorari, pp. A19-A29, A17-A18).

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

No. 88-2026C (5)

IN RE: SHELDON BARUCH TOIBB,
Debtor-Appellant.

Appeal from the United States Bankruptcy Court
for the Eastern District of Missouri
Bankruptcy Case No. 86-02881
Honorable Barry S. Schermer,
Bankruptcy Judge

BRIEF IN BEHALF OF DEBTOR-APPELLANT
SHELDON BARUCH TOIBB

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JURISDICTIONAL STATEMENT

This appeal, arising from the order of the United States Bankruptcy Court, Eastern District of Missouri, dated August 1, 1988, dismissing Debtor-Appellant's Title 11, Chapter 11 Reorganization case, falls within the appellate jurisdiction of the United States District Court pursuant to Title 28, Section 158(a) of the United States Code.

STATEMENT OF ISSUES

I. Was it error for the Bankruptcy Court, sua sponte, to dismiss Debtor's Chapter 11 Reorganization Case for alleged non-eligibility in the absence of any such request or contention by the Debtor's creditors?

II. Was it error for the Bankruptcy Court to dismiss Debtor's Reorganization Case pursuant to the *Wamsganz* decision, in light of Debtor's contention and uncontradicted testimony that he is engaged in business?

III. Was it error for the Bankruptcy Court to dismiss Debtor's Reorganization Case under the holding of the *Wamsganz* decision?

STATEMENT OF THE CASE

This is an appeal of a dismissal order of the Bankruptcy Court entered on August 1, 1988, dismissing Debtor's case under Chapter 11 of the Bankruptcy Code for his alleged failure to qualify as a Chapter 11 debtor. Said alleged failure to qualify was based on the Court's finding that the Debtor was not engaged in any "ongoing business which satisfies the Chapter 11 eligibility requirements as delineated in the Eighth Circuit's *Wamsganz* case". (See Memorandum Opinion of August 1, 1988.)

Debtor had previously filed a Voluntary Chapter 7 Petition on November 18, 1986. On October 2, 1987, by leave of Court, Debtor converted his case to one under

Chapter 11 of the Code. Thereafter, on March 8, 1988, the Court, *sua sponte*, entered an Order to show cause why the Debtor's Chapter 11 case should not be dismissed for failure to qualify as a Chapter 11 debtor. It should be noted that said Order was entered on the day following a hearing on Debtor's proposed Section 1125 disclosure statement.

Pursuant to the Court's March 8th Order, a show cause hearing was held before the Bankruptcy Court, at which the Debtor and his counsel appeared. Although duly notified, none of Debtor's creditors appeared at said hearing, nor did any of them file a substantively similar adversarial motion requesting that Debtor's case be dismissed for failure to qualify as a Chapter 11 debtor.

At said hearing the Debtor testified that he was a licensed attorney who, through his work with the Federal Energy Regulatory Commission and a private law firm, had gained considerable expertise in the field of energy law. (T 11, 12). Subsequent to leaving said employment, Debtor became an independent consultant in that field and proceeded to formulate a business plan for the formation of an independent hydroelectric generation corporation. (T 12, 13). Debtor was then able to successfully market said plan to several interested entrepreneurs, who in turn formed a fledgling corporation, Independence Electric Corporation (hereinafter referred to as "IEC") to implement said plan. In exchange for his business plan, Debtor received a 24% stock interest in IEC, as well as other consideration. (T 13). Additionally, Debtor was able to negotiate and execute a consulting agreement with IEC as an independent contractor. (T 17-20). According to the testimony of the Debtor, he had an expectancy that said consultancy would continue indefinitely, based implicitly on the company's implementation of his business plan through final development of its hydroelectric generation facilities. (T 18). During this time, the Debtor incurred both substantial

personal and business debts in connection with his activities in this regard. (T 18-24).

In April of 1985, Debtor's consultancy was terminated in what he believed was a wrongful attempt by his two fellow shareholders to "squeeze out" the Debtor from his substantial equity interest in the emerging enterprise of IEC. (T 23). Thereafter, he retained legal counsel for the purpose of attempting to restore and protect his right to be a consultant with IEC and to protect his stock interest in the company. (T 25,26). Said retainer, in the amount of \$6,000.00, was funded through a line of credit on his personal credit cards. (T 26). Said credit card account debt was in existence at the time that the Debtor filed for relief under Chapter 11. (T 25,26).¹ Similarly, Debtor also incurred additional indebtedness with retained counsel over and above his original retainer to his attorney.

Despite the termination of his consultancy with IEC, Debtor continued to actively pursue other consultancies with various concerns in the energy and utility fields. (T 29-31). He incurred unpaid debts in that regard, which were set forth on his schedule of liabilities. (T 31). Concomitantly, he continued to incur additional debt in order to track the progress of IEC, the company which he founded. (T 28).

During the summer of 1986, Debtor was led to believe, through the actions and representations of the controlling shareholders (i.e. IEC management), that the company had been abandoned. (T 31, 32).

Relying on this belief, the Debtor presumed his stock in IEC had become worthless (T 32). Accordingly, he filed a petition for Chapter 7 relief in November of 1986, having run up additional business related and personal

¹ Said debt is alluded to herein as an illustrative example of the entangled relationship between Debtor's personal debts and finances and his business activities.

debt in the interim period subsequent to his termination with IEC and the filing of his Chapter 7 petition. (See, e.g., Debtor's Schedule of Assets and Liabilities).

In January, 1987, Debtor learned that IEC had not been abandoned and was still actively pursuing its business interests and had gone forward on its license applications for the construction of its power plants. (T 33). That same month, IEC requested the services of the Debtor to solicit potential investors in the corporation's hydroelectric power sites. The corporation thereafter was able to obtain federal licenses for the construction of four power plants. (T 33).

The Debtor additionally testified to his reasonable expectancy of resuming his independent consultancy with IEC and that his continued unfettered control of his IEC shares were critical to such expectancy. (T 34). Additionally, his continued ownership of IEC stock was an important credibility factor in seeking out other consultancies in his field of expertise. (T 55).

Based on his substantial legal background, he additionally testified to his belief that in the event that the resumption of his consultancy could not be worked out with the remaining shareholders of IEC, he would have a very strong cause of action against said shareholders. (T 34). He further testified as to his willingness to share the proceeds of any IEC stock dividends, consultancy fees, stock repurchase, or any other workout with his fellow shareholders, with his creditors. (T 35). (See Debtor's Reorganization Plan of 2-1-88).

Debtor additionally developed a secondary line of business subsequent to the filing of his Chapter 7 petition and prior to his conversion to Chapter 11 as an independently contracting charitable fund raiser on a commission basis. (T 36-39). While some of his expenses in that endeavor are reimbursable, many are not (T 37, 38), and by implication, his ability to reorganize his financial situation

is a crucial prerequisite to continuing such activity. The Debtor viewed this secondary line of business as a bridging mechanism between his then current financial situation and time in which he would be able to obtain other energy related consultancies. (T 44). In the event that the Debtor would not be able to ultimately secure such consultancies, the Debtor intended to continue this secondary line of business as a "fall back" position, although he maintained that his two lines of business were not mutually exclusive. (T 44). At the time of the show cause hearing, Debtor had already begun receiving significant fees in this secondary line of business. (T 43).

The Bankruptcy Court, however, in its memorandum opinion supporting its dismissal order, stated its finding that the Debtor was not engaged in the business of energy consulting, that his accrued debt was not related to his fund raising business, and that it could find no ongoing business which satisfied the Chapter 11 eligibility requirements as [allegedly] delineated in the Eighth Circuit's *Wamsganz* case. Memorandum Opinion of August 1, 1988. See also *Wamsganz v. Boatmen's Bank of DeSoto*, 804 F.2d 503, 505 (8th Cir. 1986). From said dismissal order and memorandum opinion the Debtor brings his appeal.

ARGUMENT

I. IT WAS ERROR FOR THE BANKRUPTCY COURT, *SUA SPONTE*, TO DISMISS DEBTOR'S CHAPTER 11 REORGANIZATION CASE FOR ALLEGED NON-ELIGIBILITY IN THE ABSENCE OF ANY SUCH REQUEST OR CONTENTION BY THE DEBTOR'S CREDITORS.

By virtue of the language and intent of the Bankruptcy Code, it is clear that the Bankruptcy Court's ability to dismiss a Chapter 11 case, *sua sponte*, is severely limited, if not outrightly prohibited. 11 U.S.C. 1112(b); *Warner vs. Universal Guardian Corporation*, 30 B.R. 528 (BAP 9th Cir., 1983); *In re Gusam Restaurant Corp.*, 737 F.2d 274 (2nd Cir., 1984). The language of Section 1112(b), which is the exclusive statutory dismissal mechanism in the case at bar, unequivocally states:

"(b) Except as provided in Subsection (c) of this section [not applicable], *on request of a party in interest* or the United States Trustee, and after notice and a hearing, the court may convert a case under this Chapter to a case under Chapter 7 of this title or may dismiss a case under this Chapter, whichever is in the best interest of creditors and the estate, for cause, including" [emphasis added]. § 1112 (b), *supra*.

As stated in part of its holding in *In re Warner*, *supra*, a 9th Circuit case factually similar to the present one:

"But it is even more clear that the Court cannot dismiss on its own motion. That Congress consciously chose to deny the power to the bankruptcy court to dismiss on its own motion is evidenced by the fact that language in the Senate Bill permitting precisely this sort of action on the court's own motion was dropped in favor of the House version re-

quiring the request for dismissal to be initiated by a party in interest."

Thus, it seems that Congress did not intend to imbue the Bankruptcy Court with the power to dismiss Chapter 11 cases on its own motion, regardless of the alleged basis for dismissal (other than the debtor's failure to file the necessary informational documents). Logically, this lack of spontaneous authority should include cases where the debtor's eligibility for Chapter 11 relief may be questionable.

There is a rational basis for this strict statutory constraint in cases when it appears to the court that an individual may not qualify as a Chapter 11 debtor. Firstly, in cases where the challenged eligibility is based upon whether the individual debtor is engaged in business, the question of whether said debtor is, in fact, in business is usually not a facially determinable or unequivocal matter. Both objective and highly subjective* factors must ultimately determine whether an individual's acts, endeavors, and enterprises constitute being engaged in business. If neither the debtor nor his creditors harbor such doubt as to whether the debtor is engaged in an ongoing business, it would seem both counterproductive and irrational to allow the Bankruptcy Court to interject an issue where none appears to exist.

Secondly, alternative procedural mechanisms exist to both the court and creditors to insure that none-eligible (i.e. non-business) debtors do not avail themselves of the benefits of Chapter 11. Needless to say, interested creditors can always file their own motion to dismiss for non-eligibility under Section 1112(b). The Court, arguably, can also deny a motion to convert to Chapter 11 when the record before it undisputably demonstrates

* Subjective to both debtor and his creditors.

that the debtor is not engaged in business or is otherwise ineligible to convert to Chapter 11.*

Lastly, in the case of an original Chapter 11 filing, this debtor suggests that the Court clerk has the inherent power to refuse to accept such a petition for filing when said petition and its accompanying schedules incontrovertably show that the debtor is ineligible.

Thus, the statutory procedural scheme and its underlying rational basis clearly demonstrate that the Bankruptcy Court herein had no statutory power to invoke the question of this debtor's non-eligibility (as an alleged non-business debtor), and that its *sua sponte* dismissal of his Chapter 11 case was reversible error.

II. IT WAS ERROR FOR THE BANKRUPTCY COURT TO DISMISS DEBTOR'S REORGANIZATION CASE PURSUANT TO THE WAMSGANZ DECISION, IN LIGHT OF DEBTOR'S CONTENTION AND UNCONTRADICTED TESTIMONY THAT HE IS ENGAGED IN BUSINESS.

Even assuming that this Court could find some enabling basis for the Bankruptcy Court to dismiss Debtor's Chapter 11 case for non-eligibility, *sua sponte*, it is Debtor's position that the Bankruptcy Court's finding, in essence, that he was not engaged in business was erroneous, was unsupported by the factual record, and constituted an abuse of discretion. In that light, the Court's dismissal of his Chapter 11 case under the *Wamsganz* holding, was reversible error.

Wamsganz vs. Boatmen's Bank of DeSoto, 804 F.2d 503 (8th Cir., 1986), is the somewhat anomalous holding of this Circuit that debtors who are not engaged in business may not seek relief absent special circumstances.

* The Bankruptcy Court in this case did approve Debtor's motion to convert to Chapter 11 on October 2, 1987, without raising any question as to his eligibility.

Wamsganz, at 505. The Bankruptcy Court herein, in its previously cited memorandum opinion, stated that it could find "no ongoing business which satisfies the eligibility requirements as delineated in the Eighth Circuit's *Wamsganz* case". Memorandum Opinion, *supra*, at page 5. Neither the Code nor the *Wamsganz* case, however, delineated any judicial test for determining whether a debtor is engaged in a business which would satisfy such eligibility requirements. To the best of this debtor's knowledge, there exists no criteria in the Code, nor in the decided cases of this or any other circuit, as to what constitutes being engaged in business. Nor is there any standard as to the burden of proof that a debtor must meet to demonstrate that he is, in fact, engaged in business, particularly when the issue of eligibility is raised by the Court on its own motion. Additionally, the Bankruptcy Court herein made no finding as to whether there were any special circumstances pursuant to the *Wamsganz* holding which would make the debtor eligible for Chapter 11, although the Court did acknowledge that this case was somewhat unusual. (T 54).

One could arguably assert, for example, that if the Bankruptcy Court has the power to raise the eligibility issue *sua sponte*, that the factual circumstances of the debtor's eligibility must be construed in the light most favorable to the debtor. If such is the case, then the Debtor's oft stated contention and his uncontradicted testimony (in both substance and effect) that he was and considered himself engaged in business would not support a finding to the contrary.²

The present case, however, is distinguishable from *Wamsganz*, insofar as the factual issue of whether the

² The absence of any ascertainable standard of proof as to the issue of whether the debtor is engaged in business further illustrates the impropriety of the court entertaining such issues on its own motion.

debtor is engaged in business, by virtue of the fact that the debtors in *Wamsganz* never contended that they were engaged in business. *Wamsganz* at 504. Distinguishably, the Debtor herein always contended that he was engaged in business, and his testimony could reasonably be construed to support that contention.

Equally important, the Bankruptcy Court, in its dismissal memorandum, made the specious argument that Debtor was "not currently engaged in the business of energy consulting". Memorandum, at 5. Because the Debtor, since the time of his entry into the energy consultation field, has always maintained his status as an independent contractor (see generally, Transcript on Appeal dated March 28, 1988), the actual and most important aspect of business of his energy consulting is the marketing of his consulting services in that field.

The "product" which the Debtor has been actively and continuously attempting to market is his services as an energy consultant. The actual performance and execution of such services is ancillary to the actual obtaining of consulting contracts. His situation would be somewhat akin, as an illustrative example, to that of a real estate broker who has not been able to effectuate an actual sale for a considerable period prior to his filing for Chapter 11 relief. While the reason for his inability to effectuate a sale may or may not be related to his financial situation (e.g. financial inability to entertain prospective purchasers) it would seem unimaginable that a bankruptcy court would find that said broker was not engaged in business if the broker was actively attempting to solicit prospective purchasers in some fashion. So too, has the Debtor herein been actively pursuing potential consultation agreements, and thus it was erroneous for the Court to make a finding to the contrary.

III. IT WAS ERROR FOR THE BANKRUPTCY COURT TO DISMISS DEBTOR'S REORGANIZATION CASE UNDER THE HOLDING OF THE WAMSGANZ DECISION.

Although the Debtor believes that it is unnecessary for this Court to reach a critical analysis of the validity of the *Wamsganz* holding as a basis for reversing the dismissal order of the Bankruptcy Court herein, nevertheless the Debtor strongly suggests that said holding is both contrary to the Code and the interest of Congress, and should be reexamined. Recognizing, however, the *stare decisis* constraints of *Wamsganz* within the Eighth Circuit, the Debtor will not herein attempt a lengthy exposition as to the rationality of the *Wamsganz* reasoning, but rather will call to this Court's attention the numerous circuits and jurisdictions which have expressly held contrary position to the holding in *Wamsganz*.³ See, e.g. *In re Moog*, 774 F.2d 1073 (11th Cir., 1985); *In re Little Creek Development Co.*, 779 F.2d 1068, 1073 (5th Cir., 1986); *In re Winshall Settlor's Trust*, 758 F.2d 1136, 1137 (6th Cir., 1985); *In re Warner*, 30 B.R. 528, (9th Cir. BAP, 1983); *In re Russell*, 60 B.R. 42 (Bkrcty. W.D. Ark 1985); *In re Markunes*, 78 B.R. 875 (Bkrcty. S.D. Ohio, 1987); *In re McStay*, 82 B.R. 763 (Bkrcty. E.D. Pa., 1988).

Most of the jurisdictions not bound by the Eighth Circuit's ruling in *Wamsganz* have chosen to adopt the holding of *Moog*, which unequivocally states that Chapter 11 relief is available to those debtors who are not engaged in business. Therefore, if the Court should choose to re-examine the Eighth Circuit's decision in *Wamsganz*, it is indisputably clear that a reversal of that holding and the adoption of the *Moog* holding would necessitate a reversal

³ Debtor would suggest that oral arguments would be a more appropriate forum for such discussion at this level of appellate proceedings.

of the Bankruptcy Court's dismissal of Debtor's Chapter 11 Case.

CONCLUSION

For the reasons stated herein, the dismissal order of August 1, 1988, entered in Debtor's case should be reversed and the case remanded to the Bankruptcy Court hereinbelow for further proceedings consistent with the status of said Reorganization Case as of the date of said order.

Respectfully submitted,

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UNITED STATES DISTRICT COURT

[Title Omitted in Printing]

Opinion and Order affirming the Order and Judgment of the United States Bankruptcy Court Dismissing Debtor's Reorganization Case Under Chapter 11 of the Bankruptcy Code (Printed as Appendix to Petition for Writ of Certiorari, pp. A9-A16, A8).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120EM

IN RE: SHELDON BARUCH TOIBB,
Debtor-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

District Court No. 88-2026C (5)
Bankruptcy Case No. 86-02881

Honorable Stephen N. Limbaugh
District Judge

PETITION FOR REHEARING EN BANC

Opinion Filed May 2, 1990

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeal No. 89-2120EM

IN RE: SHELDON BARUCH TOIBB,
Appellant.

PETITION FOR REHEARING EN BANC

Comes now Debtor/Appellant, pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, and petitions the court herein to rehear his appeal en banc, and as grounds for such petition states as follows:

1. That this cause is an appeal from an order of dismissal from the United States Bankruptcy Court for the Eastern District of Missouri, as affirmed by the United States District Court for the Eastern District.

2. That on May 2, 1990, a three judge panel filed its per curiam opinion affirming the District Court's decision in the cause hereinbelow, a copy of said opinion being attached in the addendum hereto and made a part hereof.

3. That this appeal concerns, inter alia, the availability of [Title 11] Chapter 11 reorganization relief to alleged non-business debtors under the Bankruptcy Code.

4. That in its decision, the court herein exclusively relies on its previous holding in *Wamsganz v. Boatmen's Bank of DeSoto*, 804 F.2d 503 (8th Cir. 1986) that Chapter 11 relief is not available to non-business debtors; that said holding is directly contrary to the Eleventh Circuit's holding in *In re Moog*, 774 F.2d 1073 (11th Cir., 1985), the Fifth Circuit's holding in *In re Little Creek Development Co.*, 779 F.2d 1068 (5th Cir., 1986), the

Sixth Circuit's holding in *In re Winshall's Settlor's Trust*, 758 F.2d 1136 (6th Cir., 1985) and the Ninth Circuit's [Bankruptcy Appellate Panel] holding in *Warner v. Universal Guardian Corporation*, 30 B.R. 528 (BAP 9th Cir., 1983). Moreover, it appears that most district and bankruptcy courts within the other circuits are adopting the holding of *Moog*, i.e. that non-business individual debtors are eligible for Chapter 11. See e.g. *In re McStay*, 82 B.R. 42 (Bkrcty. E.D. Pa., 1988); *Matter of Young*, 76 B.R. 376 (Bkrcty. D. Del. 1987); *In re Greene*, 57 B.R. 272 (Bkrcty. S.D. N.Y. 1986); *Grundy National Bank v. Shortt*, 80 B.R. 802 (W.D. Va. 1987); *In re Cook*, 98 B.R. 624 (Bkrcty. D. Mass. 1989); *In re Fernandez*, 97 B.R. 262 (Bkrcty. E.D. N.C. 1989).

5. Appellant believes that it would be appropriate for the Court en banc to rehear and review the decision herein and with it undertake a review of *Wamsganz*, due to the existing state of the relevant case law as described in Paragraph 4 hereinabove, and due to the following considerations:

(a) That under the *Wamsganz* holding, debtors falling within the exclusive jurisdiction of the 8th Circuit are unable to invoke a bankruptcy option presently and seemingly available to debtors falling within the jurisdiction of at least eight other circuits;

(b) The conflict in holdings between the 8th Circuit and other jurisdictions affects the availability of a substantive statutory remedy as opposed to a mere procedural or evidentiary point of law;

(c) The *Wamsganz* holding affects a potentially substantial number of consumer debtors who would not qualify for Chapter 13, such as those having consumer debts in excess of \$100,000.00 due to catastrophic illnesses or those individuals with high employment related income, consumer debts in excess of the Chapter 13 limit, and a short term inability to

hold off their creditors due to catastrophic economic factors beyond their control (e.g. savings and loan or securities market failure). In addition, it affects those individuals whose particular financial circumstances make Chapter 11 a more feasible and desirable bankruptcy than Chapter 13.

(d) That to the best of Appellant's knowledge, this Court did not issue and has never reviewed, en banc, its holding in *Wamsganz*.

6. That for the reasons stated in Paragraphs 4 and 5 hereinabove, Appellant believes that this appeal raises questions of exceptional importance.

WHEREFORE, Appellant respectfully prays this Honorable Court to grant his request for an en banc rehearing of his appeal by this Court.

Respectfully submitted,

/s/ Jonathan W. Belsky
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I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

1. Are [alleged] non-business debtors eligible for Chapter 11?

2. Can the Court raise the issue of presumed ineligibility for Chapter 11 as an [alleged] non-business debtor sua sponte?

/s/ Jonathan W. Belsky
JONATHAN W. BELSKY
Attorney for Appellant

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2120

IN RE SHELDON BARUCH TOIBB,
Debtor
SHELDON BARUCH TOIBB,
Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: April 12, 1990

Filed: May 2, 1990

Before ARNOLD, Circuit Judge, ROSS, Senior Circuit
Judge, and FAGG, Circuit Judge.

PER CURIAM.

Sheldon Baruch Toibb appeals the District Court's affirmation of the Bankruptcy Court's order dismissing his petition for reorganization under Chapter 11 of the Bankruptcy Code. We affirm.

Mr. Toibb filed a petition in bankruptcy under Chapter 7 of the Code in November of 1986. He then filed a mo-

tion to convert his bankruptcy proceeding to one under Chapter 11 eleven months later, and the Bankruptcy Court¹ granted the motion. On March 8, 1988, the Court issued an order to show cause why debtor's case should not be dismissed for Mr. Toibb's failure to qualify as a Chapter 11 debtor. The Court, after holding a hearing on the matter, found that debtor was not engaged in an ongoing business, as required to qualify for Chapter 11 relief under *Wamsganz v. Boatmen's Bank of DeSoto*, 804 F.2d 503 (8th Cir. 1986). It then ordered debtor to convert his case back to a Chapter 7 proceeding within 10 days, or the case would be dismissed. Mr. Toibb then appealed the Bankruptcy Court's decision to the District Court,² where the decision was affirmed.

Mr. Toibb now appeals to this Court from the District Court's affirmance. He argues that the Bankruptcy Court erred (1) in dismissing his case *sua sponte*, without any such request from his creditors, (2) alternatively, by holding that Chapter 11 relief is available to businesses only; and (3) by finding that he was not engaged in an ongoing business for the purposes of eligibility under Chapter 11. We conclude that the Bankruptcy Court did have authority to dismiss the proceeding *sua sponte*, and that the Bankruptcy Court was controlled by *Wamsganz*, 804 F.2d 503. We can also find no error in the Bankruptcy Court's finding that Mr. Toibb did not qualify as a business entitled to Chapter 11 protection.

Affirmed. See 8th Cir. R. 47B.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

[Certificate of Service Omitted in Printing]

¹ The Hon. Barry S. Schermer, United States Bankruptcy Judge for the Eastern District of Missouri.

² The Hon. Stephen M. Limbaugh, United States District Judge for the Eastern and Western Districts of Missouri.

UNITED STATES COURT OF APPEALS

[Title Omitted in Printing]

Opinion and Order Denying Rehearing En Banc by Reason of the Lack of a Majority of the Active Judges Voting To Rehear the Case En Banc, and Denying Rehearing by the Panel (Printed as Appendix to Petition for Writ of Certiorari, pp. A2-A6, A7).

UNITED STATES SUPREME COURT

[Title Omitted in Printing]

Order Granting Petition for Writ of Certiorari entered 18 January 1991.

FEDERAL STATUTE INVOLVED
11 U.S.C. § 109

§ 109. Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not—

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h)); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

(1) is a municipality;

(2) is generally authorized to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5) (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than \$100,000 and noncontingent, liquidated, secured debts of less than \$350,000, or an individual with regular income and such individual's spouse, except a stockholder or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$100,000 and noncontingent, liquidated, secured debts of less than \$350,000 may be a debtor under chapter 13 of this title.

(f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2557; Pub. L. 97-320, title VII, § 703(d), Oct. 15, 1982, 96 Stat. 1539; Pub. L. 98-353, title III, §§ 301, 425, July 10, 1984, 98 Stat. 352, 369; Pub. L. 99-554, title II, § 253, Oct. 27, 1986, 100 Stat. 3105; Pub. L. 100-597, § 2, Nov. 3, 1988, 102 Stat. 3028.)